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No. 81-5321

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether death is an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life?

2. Whether petitioner's degree of participation in the killings was given inadequate consideration and inadequate weight by the Florida courts, thereby violating his rights under the Eighth and Fourteenth Amendments?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Florida affirming petitioner's convictions of first-degree murder and sentences of death by electrocution is reported in *Enmund v. State*, 399

So. 2d 1362 (Fla. 1981); A. 34-56.[1] The judgment and findings of fact on sentencing of the Circuit Court of Hardee County, Florida are unreported and appear at A. 25-26, 29-33.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was entered on April 16, 1981. A timely petition for rehearing was denied by that court on July 20, 1981. The petition for certiorari was filed on August 25, 1981, and granted on October 19, 1981. ____ U.S. ____, 50 U.S.L.W. 3300 (U.S.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted ....

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[1]Numbers preceded by "A." refer to pages of the Joint Appendix; numbers preceded by "R." refer to transcript pages not reproduced in the Joint Appendix; numbers preceded by "S.R." refer to pages in the supplemental record on appeal not reproduced in the Joint Appendix.

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law.

This case also involves the following provisions of the statutes of the State of Florida, which are set forth in Appendix B to this brief: Fla. Stat. Ann. §§782.04, 921.141.

STATEMENT OF THE CASE

On April 1, 1975, Thomas and Eunice Kersey were robbed at their farmhouse in central Florida. R. 1084-85. In an exchange of gunfire that left one of the robbers wounded, Mr. and Mrs. Kersey were fatally shot. R. 1102, 1106. A Hardee County grand jury subsequently indicted Sampson Armstrong, his wife, Jeanette Armstrong, and petitioner Earl Enmund, a forty-three-year old black farmer, for the first-degree murder and robbery of the Kerseys. A. 1-3; R. 1467-70.

As the case comes to this Court, the Supreme Court of Florida has sustained petitioner Earl Enmund's sentence of death on findings: (i) that "the only evidence" linking him to the homicides is the "inference" that he was in a car 200 yards (R. 1037) from the Kerseys' home when his confederates in a robbery plan, the Armstrongs, killed the Kerseys (A. 49-50; *Enmund v. State*, 399 So. 2d 1362, 1370 (Fla. 1981));[2] and (ii) that "the killings were spon-

[2]Sampson Armstrong admitted to two witnesses who testified at trial that he and Jeanette Armstrong actually "pulled" the robbery (R. 3, 1207-08, 1347-52), and that he killed the Kerseys (R. 1207-08, 1347-52, 1354).

taneous and were precipitated by the armed resistance of Mrs. Kersey," who initiated the gun battle by shooting Jeanette Armstrong (*Armstrong v. State*, 399 So. 2d 953, 963 (Fla. 1981)[3]). The Florida Supreme Court held that these findings would support a sentence of death under "the felony murder portion of [Fla. Stat. Ann.] section 782.04(1)(a)" (A. 50; 399 So. 2d at 1370), although "the evidence does not establish that [petitioner] . . . intended to take life" (A. 51; 399 So. 2d at 1371).

In view of the Florida Supreme Court's explicit findings and conclusions, a detailed statement of the facts and proceedings below is unnecessary for consideration of the primary issue presented herein (Point I, *infra*)—whether petitioner's sentence of death is constitutionally excessive and disproportionate for an offense in which he neither took life nor intended or attempted to take life. Aspects of the proceedings below relevant to the second question presented (Point II, *infra*)—whether the Florida counts gave inadequate consideration and inadequate weight to petitioner's degree of participation in the Kersey killings—are developed within Point II.

SUMMARY OF THE ARGUMENT

I

Petitioner Earl Enmund was sentenced to die although he did not himself take life, intend to take life, or contemplate

[3]Sampson Armstrong and petitioner were jointly tried, and were convicted and sentenced to die on the same evidence. In affirming petitioner's sentence of death, the Florida Supreme Court incorporated by reference parts of its earlier decision affirming Sampson Armstrong's sentence, including the statement quoted above. A. 55; 399 So. 2d at 1373, incorporating *Armstrong v. State*, *supra*, 399 So. 2d at 963.

that it would be taken by another. The State of Florida based that punishment exclusively on petitioner's "constructive" participation in a robbery during the course of which a confederate took life as the "spontaneous" result of gunfire initiated by one of the robbery victims.

In light of Earl Enmund's lack of personal responsibility for homicide, his sentence of death is unconstitutionally excessive and disproportionate under the Eighth and Fourteenth Amendments.

First, petitioner's individual culpability—the touchstone of a constitutional administration of the death penalty under the Court's recent Eighth Amendment jurisprudence—is no different than that of any accomplice to a non-homicidal felony. Certainly, it is no greater than that of the principal participant in a serious felony short of homicide, on whom the death penalty may not constitutionally be inflicted. *Coker v. Georgia*, 433 U.S. 584 (1977). Because there is no rational way to distinguish Earl Enmund from any other participant in a non-homicidal felony based on what each did and intended, or on the risk of death created by each, the fact that identical risks fortuitously result in death in one case, but not in the other, cannot provide grounds for allowing Earl Enmund to be executed while forbidding such punishment for other non-homicidal felons.

This conclusion is further compelled by contemporary society's almost total rejection of death as an appropriate punishment for an accomplice to robbery who did not take life or intend that it be taken by another. During the past two centuries, and with progressively greater unanimity over the last decade, the agencies charged with making and enforcing the criminal laws—legislators and judges, clemency executives and jurors—have manifested an unwillingness to inflict the extreme punishment in the absence of some action or intention on the defendant's part directed at taking life.

Finally, punishing Earl Enmund with death for the results of the homicidal actions of another has neither deterrent efficacy nor any retributive justification in the absence of an intention on petitioner's part that such homicidal results come to pass.

II

Both the trial court and the Florida Supreme Court took inadequate account of petitioner's degree of participation in the crime for which he was sentenced to death, in violation of his rights under the Eighth and Fourteenth Amendments. First, the Florida courts did not even consider petitioner's degree of participation in the killings and lack of intent to kill as independent mitigating circumstances as required by *Lockett v. Ohio*, 438 U.S. 586 (1978). Second, the fact-finding process that underlies petitioner's death sentence did not afford him the reliable inquiry into the extent of his culpability and the reasoned determination as to why he should be executed for his role in the crime that is constitutionally demanded in order to support a decision to inflict society's most extreme punishment. Third, the Florida courts consigned petitioner to death even though there were no aggravating factors sufficient to outweigh the overwhelming mitigating force of his lack of intent to kill, thereby subjecting petitioner to a sentence which is palpably excessive and disproportionate punishment, particularly by contrast to Florida's treatment of other cases involving accessorial liability.

ARGUMENT

I. DEATH IS AN UNCONSTITUTIONALLY EXCESSIVE AND DISPROPORTIONATE PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS FOR ONE WHO NEITHER TOOK LIFE, ATTEMPTED TO TAKE LIFE, NOR INTENDED TO TAKE LIFE

A. Introduction

As part of its comprehensive review of the constitutionality of capital punishment, the prevailing opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976), undertook to "consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed." *Id.* at 187. Considering that Eighth Amendment question "only with [regard to] the crime of murder, *and* when a life has been taken deliberately by the offender," the plurality was unable to conclude that "the punishment is invariably disporportionate to the crime." *Id.* (emphasis added). "It is an extreme sanction, suitable to the most extreme of crimes." *Id.*

In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court considered the constitutionality of the death penalty for another "highly reprehensible" though less extreme offense. *Id.* at 597 (plurality opinion). It held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592.

Woodson v. North Carolina, 428 U.S. 280 (1976), presented an issue falling between *Gregg* and *Coker*. Woodson

had participated in a robbery during which a codefendant took the victim's life. Woodson's personal culpability was thus indistinguishable from Coker's in terms of what he had done or intended, or the risks created by his conduct; but because those risks had happened to materialize, the *consequences* of the robbery in which he had engaged included the death of a human being and, to that extent, resembled Gregg's. Identifying the resulting constitutional question as "whether imposition of the death penalty on petitioner Woodson would have been so disproportionate *to the nature of his involvement in the capital offense* as . . . to violate the Eighth and Fourteenth Amendment," 428 U.S. at 305 n.40 (plurality opinion) (emphasis added), the Court found it "unnecessary to reach [that] . . . question," *id.* Again in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court withheld decision on whether "the death penalty is constitutionally disproportionate for [an accessory in a robbery-murder] . . . who has not been proved to have taken life, to have attempted to take life, or to have intended to take life."[4] *Id.* at 609 n.16 (plurality opinion).

Petitioner's case once again presents the issue reserved in *Woodson* and *Lockett*: specifically, whether the State of Florida may constitutionally take Earl Enmund's life for an offense in which he neither took, attempted to take, nor intended to take, anyone's life. We address that issue in the remainder of this Point I from several perspectives developed by the Court's recent Eighth Amendment decisions. But the

[4]See also *Coker v. Georgia*, *supra*, 433 U.S. at 592, citing *Gregg v. Georgia*, *supra*, 428 U.S. at 187 n.35; "In *Gregg* . . . the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes."

essence of our submission is simple, and bears statement at the outset:

From the point of view of his individual and personal culpability—what he did and what he intended—Earl Enmund is not rationally differentiable from Ehrlich Coker. His deliberate conduct created no greater danger of death to others than did Coker's. Fortuitiously, death of others did occur here, not in Coker's case. The question is whether that fortuity makes a constitutionally decisive difference.

We submit that it does not, and cannot, in the light of the consistent emphasis upon individual culpability—upon the characteristics of the particular offense and offender—that has animated this Court's entire Eighth Amendment jurisprudence of capital punishment since 1972. See, *e.g.*, *Harry Roberts v. Louisiana*, 431 U.S. 633 (1977); *Lockett v. Ohio*, *supra*. Once it is recognized that the Eighth Amendment forbids the treatment of "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass," *Woodson v. North Carolina*, *supra*, 428 U.S. at 304 (plurality opinion), then Earl Enmund's technical guilt of first-degree murder by virtue of the interaction of the felony-murder rule and legal doctrines of accessorial liability can no longer warrant classing him among the Greggs, rather than admitting his factual identity with Ehrlich Coker, for purposes of the Constitution's prohibition of disproportionate and excessive punishment. To distinguish Enmund from Coker upon grounds that have no bearing on the individual culpability and fitness for punishment of each would trivialize the Eighth Amendment by a "dialectic . . . empty of reason," *Trop v. Dulles*, 356 U.S. 86, 125 (1958) (Justice Frankfurter, dissenting).

Under the Eighth and Fourteenth Amendments, as interpreted in *Gregg* and *Coker*, "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia, supra*, 433 U.S. at 592. Accord, *Gregg v. Georgia, supra*, 428 U.S. at 173. "A punishment might fail the test on either ground," *Coker v. Georgia, supra*, 433 U.S. at 592, or as the "cumulative" result of a poor showing on both, *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Justice Brennan, concurring).

We show below that, under either test, the uniquely severe penalty of death is disproportionate and excessive punishment for an offense which, despite its seriousness, is simply not among "the most extreme of crimes." *Gregg v. Georgia, supra*, 428 U.S. at 187.

B. Petitioner's Sentence of Death Is Grossly Disproportionate to the Seriousness of His Crime

1. In view of the nature and degree of petitioner's participation in the offense for which he stands condemned, the death penalty here is as disproportionately severe as the one invalidated in *Coker v. Georgia*

The Cruel and Unusual Punishment Clause of the Eighth Amendment is in part directed " 'against . . . punishments which by their excessive . . . severity are greatly disproportioned to the offense charged.' " *Weems v. United States*, 217 U.S. 349, 371 (1910), quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Justice Field,

dissenting). See *Rummel v. Estelle,* 445 U.S. 263, 271-77 (1980) (citing cases). Accordingly, "[a]lthough determining the range of available punishments for a particular crime is a legislative function, the very presence of the Cruel and Unusual Punishment Clause within the Bill of Rights requires . . . that courts decide whether particular" punishments authorized by a legislature fall afoul of this requirement of proportionality. *Furman v. Georgia, supra,* 408 U.S. at 433 (Justice Powell, dissenting).

Disproportionality analysis gauges the fitness of the penalty and "the nature of the conduct made criminal." *Powell v. Texas,* 392 U.S. 514, 531-32 (1968). Because "[t]here is no question that death as a punishment is unique in its severity and irrevocability," *Gregg v. Georgia, supra,* 428 U.S. at 187,[5] the Court has said that the death penalty demands more "considerate adaptation . . . to the degree of the crime"[6] than do other sanctions. *Rummel v. Estelle, supra,* 445 U.S. at 272, 275; *see Gregg v. Georgia, supra,* 428 U.S. at 187. Accordingly, it is essential to identify precisely the conduct for which petitioner Earl Eumund is being punished, in order to measure its fitness for the unique penalty of death.

Petitioner was convicted and sentenced to die under the felony-murder and accessorial-liability principles of Fla. Stat. Ann. §782.04(1)(a), as construed by the Supreme Court of Florida in *State v. Dixon,* 283 So. 2d 1, 11 (Fla. 1973), and *Adams v. State,* 341 So. 2d 765, 768-69 (Fla. 1976). A. 45-48; R. 1553. Those principles "allow for a

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[5]Accord, *e.g., Rummel v. Estelle, supra,* 445 U.S. at 263, 272; *Gardner v. Florida,* 430 U.S. 349, 357-58 (1977) (plurality opinion); *Woodson v. North Carolina, supra,* 428 U.S. at 305.

[6]*Weems v. United States, supra,* 217 U.S. at 365.

particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of a . . . robbery in the course of which a person is killed, even though accidentally," *Lockett v. Ohio, supra,* 438 U.S. at 613 (Justice Blackmun, concurring), through interaction of the principal offender's "strict"[7] liability for deaths occurring during the perpetration of a felony, and the accomplice's "constructive"[8] liability for the acts of the principal offender.

As the Supreme Court of Florida has described the first branch of this interaction, the

> felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting to perpetrate a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder. The malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device.

Adams v. State, supra, 341 So. 2d at 767-68 (footnotes omitted); accord, *Mahaun v. State,* 377 So. 2d 1158, 1160 (Fla. 1979).

The second step is to extend the principal felon's responsibility for capital murder to all *accomplices* in the felony by yet another "constructive . . . device":

> [A]n individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. . . .

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[7] "[T]he felony-murder rule . . . assigns strict liability for homicide committed during the commission of a felony." ALI, MODEL PENAL CODE §210.2, Comment, at 15 (Official Draft and Revised Comments 1980) (hereinafter cited as "(1980)").

[8] *See Pope v. State,* 94 So. 865, 871 (1922).

> Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide.

A. 46, quoting *Adams v. State, supra,* 341 So. 2d at 768.

Under these doctrines, it is immaterial that the homicide occurred "accidentally" and was not "actually contemplated" by the felonious design in which the accomplices shared. *Hampton v. State,* 336 So. 2d 378, 380 (Fla. App. 1976); see *Pope v. State,* 94 So. 865, 872 (1922). Moreover, the requirement that accomplices be "personally present" is attenuated by a Florida rule that such "presence" need not be "actual," but is also constructively supplied, so long as the accomplice was "sufficiently near and so situated as to . . . encourage . . . the actual perpetrator." A. 49; 399 So. 2d at 1370, quoting *Pope v. State, supra,* 94 So. at 871.

Only by virtue of "the unusual degree to which [these doctrines] . . . require [ ] capital punishment of a mere aider and abettor in [a] . . . felony resulting in a fatality," *Lockett v. Ohio, supra,* 438 U.S. at 616 (Justice Blackmun, concurring), could and did the Supreme Court of Florida justify its affirmance of petitioner's death sentence. It did not dispute his factual contention that "the evidence does not establish that he intended to take life" (A. 51), nor could it have disputed that proposition on this record. For the record establishes at worst that petitioner associated himself with a plan "[t]o rob" Mr. and Mrs. Kersey,[9] and sat "under the

[9]The only evidence at trial concerning the scope of the felonious plan is in Jay B. Neal's description of his conversation with Sampson Armstrong:

> Q Did Sampson tell you why he went out there?
>
> A Huh?
>
> Q Did Sampson tell you why he went out there?
>
> A Why he went out there?
>
> Q Yes, to begin with?
>
> A To rob them.

(R. 1351).

wheel" of the getaway car "about 200 yards west of the [Kerseys'] home" (R. 1037, 1039) while the robbery took place. By Sampson Armstrong's own admissions, it was Sampson with "his old lady," Jeanette Armstrong, who actually "pulled" the robbery (R. 3, 1348), and who shot and killed both victims after Mrs. Kersey opened fire on Jeanette (R. 1347-52, 1207-08). That the killings were no part of the robbery plan is manifested by the Florida Supreme Court's description of them as "spontaneous" and "precipitated by the armed resistance of Mrs. Kersey."[10] A. 55; 399 So. 2d at 1373, incorporating *Armstrong v. State, supra,* 399 So. 2d at 963. That petitioner took no part in them is manifested by its finding that "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car . . . near the scene of the crimes" (A. 49), making him legally "a principal of the second degree, constructively present aiding and abetting [Sampson Armstrong's] . . . commission of the . . . robbery" during which Armstrong killed the Kerseys. A. 50.[11]

At most, therefore, petitioner's own conduct for which he has been sentenced to be executed is his before- and after-the-fact participation in the non-homicidal crime of robbery. His "individual culpability"[12] begins and ends there.

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[10]The jury was instructed to find petitioner guilty of first-degree murder, regardless of whether or not "there was a premeditated design or intent to kill," if he was "engaged in the perpetration of robbery" during which life was taken by "someone acting in consort [sic] with" him. A. 6, 8, 9.

[11]By the Supreme Court's own definition of its terms, these findings necessarily mean that petitioner did not commit either the robbery or the homicide "with his own hands" (A. 47), and that he was not "actual[ly]" present during the commission of either offense. A. 49.

[12]*Stanislaus Roberts v. Louisiana,* 428 U.S. 325, 333 (1976) (plurality opinion), quoting *Furman v. Georgia, supra,* 408 U.S. at 402 (Chief Justice Burger, dissenting).

Whether gauged by act or by intention, it is patently no greater than Ehrlich Coker's.

Coker and petitioner both committed serious felonies that do not contemplate the taking of human life. Both thereby created a risk — which in neither case was found to have been deliberately incurred or even foreseen—that, by setting in train a series of events, the death of another person might result.[13] Fortunately, in Coker's case the risk did not materialize. In petitioner's case it did. That is the only difference between them.

It is also the only difference between petitioner and any other accessory to a robbery. They create the same risks of harm to human life; but in only some cases do the risks come to pass. Petitioner did nothing more than any other accessory to make them come to pass. Surely, "that degree of respect due the uniqueness of the individual" which requires "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio, supra,* 438 U.S. at 605, forbids the subjection of petitioner alone to capital punishment by happenstance, when nothing *he* has done or intended sets him apart from Coker or other non-homicidal felons[14] in regard to "relevant facets of the

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[13]Coker not only threatened his victim and her husband with a knife, but later held it to her throat before releasing her. See *Coker v. Georgia, supra,* 433 U.S. at 587 (plurality opinion).

[14]In a per curiam opinion in *Eberhart v. Georgia,* 433 U.S. 917 (1977), the Court followed *Coker* by summarily reversing death sentences for kidnapping as well as rape. In *Gregg,* the Court noted that the Supreme Court of Georgia had "effectively foreclosed" that State's death penalty for armed robbery because it was " 'excessive or disproportionate to the penalties imposed in similar cases.' " *Gregg v. Georgia,* 428 U.S. at 224 (opinion of Justice White); *id.* at 205-06 (plurality opinion), quoting *Gregg v. State,* 233 Ga. 117, 127, 210 S.E.2d 659, 667 (1974).

character and record of the individual offender or the circumstances of the particular offense," *Woodson v. North Carolina, supra,* 428 U.S. at 304. The whole thrust of this Court's concern for a rational administration of capital punishment that focuses upon the individual offender and his offense as the basis for determining the appropriateness of a death sentence[15] requires that, unless petitioner's case can be distinguished from Coker's in dimensions relevant to personal culpability, it cannot be constitutionally distinguished at all. And plainly, it cannot.

2. In view of the objective indicia of society's contemporary rejection of death as a punishment for merely accessorial liability in an unintentional felony-murder, petitioner's sentence is disproportionately severe

The same conclusion is supported by "a careful inquiry into [the] objective indicators of society's 'evolving standards of decency' "[16] to which the Court looks in assessing a punishment's "contemporary"[17] acceptability. To these we next turn.

a. History and traditional usage

"As advised by recent cases," *Coker v. Georgia, supra,* 433 U.S. at 593, we seek guidance first in the "history and

[15] *E.g., Lockett v. Ohio, supra,* 438 U.S. at 601-05; *Harry Roberts v. Louisiana, supra,* 431 U.S. at 636-37; *Woodson v. North Carolina, supra,* 428 U.S. at 303-04; *Gregg v. Georgia, supra,* 428 U.S. at 189.

[16] *Coker v. Georgia, supra,* 433 U.S. at 603 (Justice Powell, concurring).

[17] *Gregg v. Georgia, supra,* 428 U.S. at 173.

traditional usage" of capital punishment for accessories convicted of unintended homicides under the felony-murder rule. *Woodson v. North Carolina, supra,* 428 U.S. at 288. We note at the outset that nothing in our submission challenges the felony-murder rule itself, so long as it *is* not used as the exclusive basis for inflicting capital punishment upon a defendant who has neither killed nor intended death. Nevertheless, to appreciate its significance when it is so used, its background and highly artificial character in general must be recognized.

The criminal law requirement "of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *Dennis v. United States,* 341 U.S. 494, 500 (1951) (opinion of Chief Justice Vinson). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States,* 342 U.S. 246, 250 (1952). "Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality, . . . intent generally remains an indispensible element of a criminal offense." *United States v. United States Gypsum Co.,* 438 U.S. 422, 437 (1978). See also, *e.g., United States v. Freed,* 401 U.S. 601, 607 (1971).

As has frequently been recognized, the felony-murder rule and its attendant vicarious-liability doctrines are exceptions to this "common law . . . scheme;" they "base [ ] conviction of murder not on proven culpability with respect to homicide, but on liability for another [and here another's] crime." ALI, MODEL PENAL CODE §210.2, Comment, at 36

(1980).[18] Although the rule itself remains widespread, "[t]he traditional humanity of modern Anglo-American law"[19] has resulted over the past two centuries in an increasingly concerted recognition on both sides of the Atlantic that its employment to enhance a felon's punishment through strict liability for unintended deaths arising from his felony has no validity where "the death penalty is authorized . . . . Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability." *Id.*[20]

In England, where the felony-murder rule originated, its marriage to the death penalty has frequently been described as an accident of history.[21] At earliest common law, all felonies except petty larceny were capital crimes, but neither attempts nor accidental killings were punishable at all.

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[18]See also, *e.g.*, *People v. Washington*, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 134 (1965); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550, 553 (1970).

[19]*Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion).

[20]The drafters of the Model Penal Code are not the only authorities who, in considering felony-murder, have distinguished death from all other penalties imposed for the offense. See *e.g.*, O. HOLMES, JR. THE COMMON LAW 58 (1881) (noting the currency of the felony-murder rule but taking comfort that "the law . . . does not nowadays often inflict death in such cases"); F. STROUD, MENS REA 173 (1914); Turner, *The Mental Element in Crimes at Criminal Law*, 6 CAMB. L.J. 31, 65 (1936); Hurst, *Criminal Law: The Felony Murder Doctrine Repudiated*, 36 KY. L. REV. 106, 108-09 (1946). See also 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 84 (1883).

[21]See generally, 3 J. STEPHEN, note 20, *supra*, at 57-58 (1883) (pointing out that Coke's importation of the capital felony-murder doctrine into more recent English law was based on a misreading of Bracton, since Bracton "did not say [felony-murder] was in his day punishable with death").

When the felony-murder rule arose, it served the single purpose of allowing the same penalty to be exacted for foiled felonies resulting in accidental homicide as the law already provided for all accomplished felonies, *i.e.*, death.[22] Thus, while bridging a gap in the substantive law of crimes, it exposed the putative felon to no different dimension of punishment than was commonplace, indeed accepted as inevitable, for the felony he had attempted. Since "it was immaterial whether a man was hanged for one felony or another,"[23] the concept of transferred or constructive malice had no seriously anomolous effect and it received little attention until the death penalty was abolished for most non-homicidal felonies in the 1830's.[24] See generally, *Woodson v. North Carolina, supra,* 428 U.S. at 289.

Even before the 1830's—indeed, from the moment the felony-murder rule was conceived—its effect was substantially dissipated by judge and jury nullification, as well

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[22]R. PERKINS, THE CRIMINAL LAW 44 (1969).

[23]*Powers v. Kentucky*, 110 Ky. 386, 413, 61 S.W. 735, 742 (1901).

[24]3 J. STEPHEN, note 20, *supra*, at 76 (1883).

as by royal pardon.[25] By 1953, the Royal Commission on Capital Punishment could report that "in practice [the felony-murder doctrine] . . . ha[d] been dead for many years," since its application "in effect [was] . . . limited to cases where the proper verdict would be [intentional] . . . murder even if there were no such [constructive malice] doctrine."[26] And in 1957, Parliament culminated a long history of legislative reform efforts by relegating unin-

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[25]This practical amelioration of the felony-murder doctrine through judge and jury nullification began as early as the Fourteenth Century, M. HUNARD, THE KING'S PARDON BEFORE A.D. 1307, at 98-99 (1969), and continued until the rule was legislatively abolished in 1957. Thus, the historical literature is replete with examples of (i) English judges inviting juries to convict of non-capital manslaughter, when a strict application of the common law of felony-murder required capital-murder verdicts, and, (ii) English juries, when not given that leeway by the judge, simply acquitting guilty defendants. *E.g.*, ALI MODEL PENAL CODE, §210.2, Comment, at 32 n.76 (1980); Turner, note 20, *supra*, at 55-56, 64; Wyndam, *Constructive Murder and Felonious Intent*, 34 L. MAGAZINE & REV. 461 (1902).

In cases in which the judge or jury did not relieve the defendant of capital punishment for unintended death occurring during a felony, the Home Secretary often did by granting executive clemency. *E.g.*, ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 1949-1953, at 24 (Home Office memorandum noting its practice of "strongly" considering commutation in cases of "constructive murder" in which there is "the absence of intent"); 3 J. STEPHEN, note 20, *supra*, at 57 & n.3, 85 ("The absence of a positive intention to kill, or to inflict an injury" in felony-murder situations was "perhaps the commonest case for the commutation of sentence under the existing law" at the end of the Nineteenth Century; for example, clemency granted to three defendants sentenced to die for taking part in a robbery during which one ofthem shoved the victim causing him to die of a heart attack); Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 1261, 1309 n.116 (1937) ("premeditation" crucial in Home Office deliberations on clemency in the 1930's).

[26]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 31-33.

tentional killing during a felony to manslaughter, thereby removing it from England's then-extant death penalty for murder.[27]

A reluctance to impose capital punishment for any but intentional homicides has also characterized the American experience. The earliest manifestation of this trend was the Great Law of William Penn, promulgated in 1682 for the American colony of Pennsylvania, which, until repealed by Parliament in 1718, not only abolished the death penalty for non-homicidal felonies, but also for homicides short of those committed "willfully and premeditatedly."[28] When Pennsylvania again revised its murder laws in 1792 (thus commencing the American trend toward dividing murder into degrees in order to limit the breadth of capital punishment[29]), it was first proposed by Pennsylvania Supreme

[27]English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11. Section 1 of the Act limited murder to "killing . . . done with . . . malice aforethought," and expressly abolished the "constructive malice" doctrine for homicide "in the course . . . of some other offense." Section 5(2) of the Act provided one of them shoved the victim causing him to die of a heart attack); in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict, grevious bodily harm on" the victim, "but the murder shall not be capital murder in the case of any other of the persons guilty of it." See ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT, Appendix 12, at 467-74 (describing the various legislative proposals, going back to the 1830's, to limit or abolish capital punishment, though not criminal liability, for unintended homicides resulting from felonies). In 1965, England abolished the death penalty even for premeditated murders. Murder (Abolition of Death Penalty) Act of 1965, 8 Halisbury's Stat. of England 541.

[28]Charter to William Penn and Laws of the Province of Pennsylvania, Passed Between 1682 and 1700, at 144 (1879). See Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 760-63 (1949); McCafferty, *Major Trends in the Use of Capital Punishment*, 1 AMER. CRIM. L.Q., No. 2, at 9, 12 (1964).

[29]See *Woodson v. North Carolina*, *supra*, 428 U.S. at 290; *Mullaney v. Wilbur*, 421 U.S. 684, 692-93 (1975); *McGautha v. California*, 402 U.S. 183, 197-98 (1971); *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Justice Frankfurter, dissenting).

Court Justice William Bradford that first-degree (*i.e.*, capital) murder be limited exclusively to "willful, deliberate and premeditated killing."[30] Although the Pennsylvania Senate subsequently included a felony-homicide provision in the definition of first-degree murder, it did limit the provision's scope to only four felonies.[31] Justice Bradford's proposal, and the Pennsylvania statute actually adopted, presaged reforms by other state legislatures during the Nineteenth Century designed, for the most part, to reduce drastically (and in a few States to abolish) the categories of unintentional homicides for which capital punishment could be imposed.[32] Other innovations were also made in the law of homicide during this period, but it has been authoritatively stated that "dissatisfaction" with imposing capital punishment according to the "broad criteria of implied malice was . . . the strongest motive for adopting grading in the history of the reform."[33]

As the Court has noted, the Nineteenth Century degree statutes themselves were "uniformly unsuccessful" at

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[30]W. BRADFORD, AN INQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 35 (1792); *Keedy*, note 28, *supra*, at 769-72.

[31]4 Journal of the Senate (Pa. 1794).

[32]See ALI, MODEL PENAL CODE §210.2, Comment, at 18-20, 32-36, 40-42 (1980); Alderstein, *Felony Murder: A Statutory Taxonomy*, 4 AM. J. CRIM. L. 249, 251-62, 264-65 (1975-76).

[33]Wechsler, *Degrees of Murder and Related Aspects of the Penal Law of the United States*, in ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, MINUTES OF EVIDENCE, 784, 785. In their comments annotating the Model Penal Code, Professor Wechsler and his successor conclude that the distinctions drawn by the felony-murder degree statutes made logical sense *only* as efforts to "speak to the question of capital punishment." ALI, MODEL PENAL CODE, §210.2, Comment, at 20 (1980).

codifying the classes of murder for which juries were willing to impose the penalty of death. Because large-scale jury nullification continued to occur, additional reforms were adopted, under which juries were given discretion with regard to the imposition of capital punishment. *McGautha v. California,* 402 U.S. 183, 197-99 (1971); see *Woodson v. North Carolina, supra,* 428 U.S. at 291. Prominent among the categories of "first-degree" murder for which "[j]uries continued to find the death penalty inappropriate," *id.*, was unintentional felony-murder, particularly when extended to accomplices of the actual perpetrator of the homicide.[34] The well-documented experience of the State of New York is illustrative.

In 1936, after Governor Lehman asked the New York Law Revision Commission "to consider the desirability" of modifying the State's definition of felony-murder,[35] the Commission determined that the felony-murder doctrine was encountering substantial "disapproval,"[36] evidenced

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[34]See KENNEY, OUTLINES OF THE CRIMINAL LAW 139 (1933).

[35]LAW REVISION COMMISSION OF THE STATE OF NEW YORK, SECOND ANNUAL REPORT 17 (1936). It appears that Governor Lehman took this action because of the frequency with which he found himself commuting the death sentences of persons convicted of felony murder whose equally or more culpable accomplices, in severed trials, had either been acquitted or convicted of a lesser degree of crime. See Appendix C.

[36]This was so although by 1937 the New York Legislature had already limited the State's mandatory death penalty for first-degree felony-murder to homicides committed during the course of a handful of felonies, and the New York courts had further limited the doctrine by taking an extremely narrow view of the duration of the underlying felony during which the felon was strictly and capitally liable for any resulting deaths. See generally, Wechsler, note 33, *supra,* at 784; Note, *The Two-Trial System in Capital Cases,* 39 N.Y.U.L. REV. 50, 50-51 & n.10 (1964).

not only by "the difficulty of securing convictions by juries under a rule contrary to the prevailing feeling," but also by "the evasions or artifices of the courts" in restrictively construing the doctrine.[37] LAW REVISION COMMISSION OF THE STATE OF NEW YORK, THIRD ANNUAL REPORT 666, 668 & n.444 (1937). The Commission particularly criticized the State's first-degree felony-murder rule for imposing capital "liability on the defendant whose accomplice has committed homicide in the course of a felony," finding it "defective not in its substantive provision," but instead in its requirement that all of the

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[37]As in England, see note 25, *supra*, a good bit of judicial nullification has characterized the history of capital felony-murder in this country. See generally, ALI, MODEL PENAL CODE, §210.2, Comments, at 34-35 & nn.81-90 (1980) (collecting cases, and noting that limiting interpretations occur "most frequently in cases where the act of killing is done by someone other than the accused"); note 18, *supra*.

Furthermore, in the two or three jurisdictions in this country with well-established pre-*Furman* traditions of appellate review of capital sentences, see Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521 (1937), a consensus early developed not only that "there can be no more aggravated killing" than one that was "deliberately planned," *id.* at 531, but also that death sentences should be reduced in cases in which (i) there was not a strong showing of premeditation, or (ii) the offender was not the actual perpetrator of the homicide, even where the perpetrator himself was executed. *E.g.*, *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964) (uncertain from the evidence if defendant was the actual perpetrator; death sentence reduced to life); *Wesley v. State*, 112 Neb. 360, 199 N.W. 719 (1924) (death sentence of youthful non-triggerman reduced to life); *Fritz v. State*, 8 Okla. Cr. 342, 128 Pac. 170 (1917) (death sentence for accidental death resulting from killing during a felony reduced to life).

accomplices "pay the extreme penalty of death." *Id.* at 699-700.[38]

The Law Revision Commission proposed solving these problems by limiting first-degree (*i.e.*, capital) felony-murder "to cases in which there exists some element" of *mens rea*, and by limiting the accomplice's liability to instances in which the felonious confederacy encompassed any "agreement to kill." *Id.* at 673, 697. However, as in so many other jurisdictions, *see Woodson v. North Carolina*, *supra*, 428 U.S. at 291-92, the legislature chose instead to moderate the effect of capital punishment in felony-murder cases by giving juries discretion to recommend life sentences in such situations[39]—an innovation, notably, that the legislature did not find necessary with regard to *intentional* first-degree murder for an additional quarter century.[40]

Like judge and jury nullification of the death penalty for unintended homicides resulting from felonies, "[e]xecutive clemency" has historically provided a "common means of avoiding [such] . . . questionable executions." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 477 (Burton, J., dissenting). Where available, the records of gubernatorial pardons reveal a steady flow of commutations to felony-

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[38]Professor Wechsler attributes the legislative reform that grew out of the Commission's report "mainly [to] the fear of jury nullification in cases where accomplices are not of equal culpability in relation to the homicide." Wechsler, note 33, *supra*, at 784. Accord, Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 53 & n.7 (1956).

[39]N.Y. Laws 1937, c. 67. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (characterizing this statutory reform as consistent with the "modern philosophy of penology that the punishment should fit the offender and not merely the crime.")

[40]*See* Note, note 36, *supra*, at 50-51 & n.10.

homicide offenders whose accidental perpetration of, or limited participation in, the homicidal act convinced the executive of an absence of homicidal intent.[41] Where statistical data are available, they, too, demonstrate the historically important role played in capital clemency decisions by the offender's lack of premeditation and by the executive's desire to calibrate the punishment received by felony-murder accomplices more accurately to their relative degrees of responsibility for the homicide and thus to avoid a result that "does not correspond to the feeling of the population."[42] 3 UNITED STATES DEPARTMENT OF JUSTICE, SURVEY OF RELEASE PROCEDURES, PARDON 64 (1939).

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[41]Such commutations are numerous. Petitioner has collected a number of illustrative examples in Appendix C.

[42]For example, a study of the "major themes recurring in governors' statements in justifying commutation" of death sentences in North Carolina between 1909 and 1954 demonstrate that, aside from a jury's or judge's recommendation of commutation and mental disorder, the prisoner's lack of premeditation on the criminal act is the most frequently cited reason for commuting death sentences to terms of imprisonment—and its importance grew steadily over the period studied. Johnson, *Selective Forces in Capital Punishment*, 36 SOC. FORCES 165, 167-68 (1957). Accord, Wolfgang, Kelly & Nolde, *Comparison of the Executed and Commuted among Admissions to Death Row*, 53 J. CRIM. L. CRIM. & POL. SCI. 301 (1953) (study of 62 commutations in Pennsylvania between 1914 and 1958, of which a third were based either on lack of premeditation, the offender's not being personally responsible for the homicide, or both); see W. SMITHERS, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 166 (1909); Barnett, *The Grounds of Pardon*, 17 J. CRIM. L. CRIM. & POL. SCI. 490, 503 (1927).

The authors of the most comprehensive study of American executive clemency practices in capital cases conclude that "the commuting of the death sentences to peripheral participants in conspiratorial murders dramatizes the imperfection of a law which attaches equal punishment for acts with differing degrees of culpability." Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 164 (1964).

As the Court has frequently held, the Eighth Amendment's "applicability must change as the basic mores of society change." *Furman v. Georgia, supra,* 408 U.S. at 382 (Chief Justice Burger, dissenting). The history and traditional usage of capital punishment for accessorial liability in felony-murder cases in this country and England reveal a marked erosion over the past two centuries in the degree to which the mores of contemporary Anglo-American society have tolerated the execution of felons who did not intentionally—and particularly who did not personally—take the life of another. We next show that this trend has accelerated dramatically in this country during the past decade.

b. Contemporary legislative judgments

"In a democracy the first indicator of the public's attitude" toward a given punishment for a given crime "must always be found in the legislative judgments of the people's chosen representatives." *Furman v. Georgia, supra,* 408 U.S. at 436-37 (Powell, J., dissenting). Since *Furman,* almost every jurisdiction in the country that previously had a capital-sentencing statute has substantially revised it. As a whole, the recent legislative judgments thus expressed reveal a strong and growing consensus "weigh[ing] very heavily on the side of rejecting capital punishment as a suitable punishment" for vicarious felony-murder, *Coker v. Georgia, supra,* 433 U.S. at 596.

Of the 37 state and federal jurisdictions in this country that now authorize the death penalty, fully 29 do not permit its imposition on the sole basis of the defendant's participation in a robbery resulting in a homicide, where the defendant neither committed the homicidal act nor intended or

contemplated its commission. In only 8 jurisdictions including Florida is an accomplice made eligible for death on the ground of his unadorned participation in a robbery during which someone else kills.

Specifically, 14 jurisdictions require some culpable mental state with regard to the homicide—usually intent—as a prerequisite to conviction of the capital degree of that crime.[43] Four additional states require proof beyond a

[43]Eleven jurisdictions make knowing, intentional, or premeditated killing an element of capital murder. 1981 Ala. Acts, §2(b), incorporating Ala. Code §13-A-6-2(a)(1) ("intent to cause the death of another person"); La. Crim. Code Ann. §14.30(1) (1981 Supp.) ("specific intent to kill"); Mo. Rev. Stat. §§565.001, 565.008 (Supp. 1981) (premeditation and deliberation); N.H. Rev. Stat. Ann. §630:1(I) (Supp. 1979) ("knowingly cause the death of another"); N.Y. Penal Law §125.27(1)(a)(iii) (McKinney Supp. 1980) (see *People v. Davis*, 43 N.Y. 2d 17, 400 N.Y.S.2d 735 (1977)) ("intent to cause the death of another"); Baldwin's Ohio Legisl. Serv. 1981, at 5-165 (S.B. No. 1), §§2903.01(B), (D) [enacted following *Lockett v. Ohio*, *supra*] ("purposely . . . cause the death of another"); 18 Pa. Cons. Stat. Ann. §§1102, 2502(a) (Purdon's 1981) ("intentional killing"); Tex. Penal Code Ann., §§19.02(a)(1), 19.03(a)(2) ("intentionally or knowingly causes the death of an individual" *and* "intentionally commits the murder in the course of [a felony]"); Utah Code Ann. §76-5-202(1) ("intentionally or knowingly causes the death of another"); Va. Code Ann. §18-2-31(d) ("willful, deliberate and premeditated killing"); Wash. Legisl. Serv. 1981, No. 3, ch. 138, §2, incorporating Wash. Rev. Code Ann. §9A.32.030(1)(a) ("premeditated intent to cause the death of another").

In addition, three states require proof of some mental state short of intent to justify imposition of the death penalty. Ark. Stat. Ann. §41-1501(1)(a) (Supp. 1979) ("extreme indifference to . . . life"); Del. Code, Tit. 11, §§636(2), (4) (1981 Supp.) ("recklessly" or "negligently" cause death during the commission of a felony); Baldwin's Ky. Rev. Stat. §507.020(b) ("extreme indifference to human life" and "wanton . . . conduct which creates a grave risk of death . . . and thereby causes death"). As analyzed in the recently revised commentary to the Model Penal Code, these formulations require proof of an actual "awareness" on the defendant's part "of the creation of substantial homicidal risk;"

(continued)

reasonable doubt of intentional homicide before allowing felony-murder to serve as an aggravating circumstance warranting infliction of the death penalty.[44] Seven more exclude felony-murder altogether from their lists of aggravating circumstances that will support a death sentence.[45] Two jurisdictions expressly preclude the death penalty in cases such as petitioner's by reason of the defendant's nonparticipation in the homicidal act.[46] And two more limit the

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"inadvertent risk creation, however, extravagant and unjustified," will not suffice. ALI, MODEL PENAL CODE §210.2, Comment, at 21, 26 n.57, 27-28, 30 (1980). See Ark. Stat. Ann. §41-1501, Official Commentary of the Attorney General; Baldwin's Ky. Rev. Stat. §507.020 Commentary (adopting the "consciousness of risk" requirement and noting, with particular reference to accessorial liability in felony-homicide situations, that *each* accomplice's "participation in [the] felony" must itself "constitute[] wantonness manifesting extreme indifference to human life").

[44]Ill. Rev. Stat., ch. 38, §9-1(b)(6)(b) (Smith-Hurd Supp. 1978) ("intentionally" killed the victim); Ind. Code Ann. §35-50-2-9(b)(1) ("intentionally" killed the victim); N.M. Stat. Ann. §31-30A-5(b) ("intent to kill"); N.C. Gen. Stat. §15A-2000(e)(5), as interpreted in *State v. Cherry*, 257 S.E.2d 551, 567-68 (N.C. 1979) (absent proof of "willful, deliberate and premeditated murder" under N.C. Gen. Stat. §14-17, conviction of felony-murder precludes use of that same felony to supply the felony-murder aggravating circumstance in *id.* §15A-2000(e)(5)).

[45]Ariz. Rev. Stat. §13-703(F); Colo. Rev. Stat. Ann. §16-11-103(6); Idaho Code §19-2515(f); Mont. Rev. Codes Ann. §46-18-303 (1979); Neb. Rev. Stat. §29-2523(1) (Supp. 1979); Okla. Stat. Ann. Tit. 21, §701.12; S.D. Comp. Laws §23A-28-1 (Supp. 1980). Missouri, which is already accounted for in note 43, *supra*, and accompanying text, also precludes use of felony murder as an aggravating circumstance. Mo. Rev. Stat. §565.012(2) (Supp. 1981).

[46]49 U.S.C. §1473(6)(D) (absolute defense to the death penalty if defendant's participation in the killing was "relatively minor"); Md. Crim. Law Code Ann. §413(e)(1) (reserving death penalty for actual perpetrators of killings, *i.e.*, "principal[s] in the first degree").

(continued)

death penalty for felony-homicides to exceedingly narrow situations not involved in cases like petitioner's.[47]

Accordingly, Florida is joined by only 7 other jurisdictions of this nation[48] in a legislative judgment that mere participation in a robbery during which another robber takes life justifies the death penalty. But this does not end the matter. For the dramatic trend away from Florida's position has accelerated even during the course of the last decade.

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All told, including states already accounted for in notes 43-45, *supra* and accompanying texts, eight capital-sentencing jurisdictions make a defendant's lack of participation in the fatal act a defense to the death penalty at least so long as the defendant did not intend the death of the victim. See 1981 Ala. Acts §2(c), incorporating Ala. Code §13A-2-23 (non-participant in homicidal act not liable for death penalty absent intent to kill); Ark. Stat. Ann. §41-1501(2) (no liability for capital murder where defendant did not either commit or aid in the "homicide act itself"); Colo. Rev. Stat. Ann. §16-11-103(5) (absolute defense to the death penalty if defendant's participation in the killing was "relatively minor"); Ill. Rev. Stat., ch. 38, §9-1(b)(6)(a) (felony-murder aggravating circumstance unavailable unless the defendant "actually killed" the victim); Baldwin's Ohio Legisl. Serv. 1981, at 5-163 (S.B. No. 1), §2929.04(A)(8) (felony-murder aggravating circumstance unavailable unless the defendant actually perpetrated the killing or had previously "calculated" on taking and formed a "design" to take life during the felony); Va. Code Ann. §18.2-18 (1981 Cum. Supp.) ("except in case of killing for hire . . . an accessory before the fact or principal in the second degree to a capital murder shall be . . . tried . . . as though the offense were [non-capital] murder in the first degree").

[47]Conn. Gen. Stat. Ann. §§53a-54b(5), (7) (West Supp. 1980) (capital felony-murder limited to rape and kidnapping); Vt. Stat. Ann., Tit. 13, §§2303(b), (c) (capital murder reserved for offenders who commit a second unrelated murder or murder of a correctional officer).

[48]Cal. Penal Code §§189, 190.2(a)(17)(i) (West. Supp. 1980); Ga. Code Ann. §§26-1101(b), 27-2534.1(b)(2) (Supp. 1980); Miss. Code Ann. §§97-3-19(2)(e), 99-19-101(5)(d) (Supp. 1979); Nev. Rev. Stat. §§200.030(1)(b), 200.033(4) (1979); S.C. Code §§16-3-10, 16-3-20(C)(a)(1) (Supp. 1980); Tenn. Code Ann. §§39-2402, 39-2404(i)(7) (Supp. 1980); Wyo. Stat. Ann. §§6-4-101, 6-4-102(h)(iv) (Supp. 1980).

Thus, none of the eight jurisdictions that have enacted new death-penalty statutes since 1978 authorize capital punishment for nothing more than the defendant's participation in a robbery scheme during which life is taken by another.[49]

More and more, therefore, it is the reasoned judgment of "the State representing organized society" (*Gregg v. Georgia, supra,* 428 U.S. at 192) that death is an excessive punishment for unintended homicides, and particularly those actually committed by another. As the Supreme Court of Alabama noted in discussing that State's statutory requirement of intent for capital murder:

> The felony-murder doctrine has been severely criticized, primarily because in a variety of fact situations it often operates to charge an individual with first degree murder when the accused did not have the required intent for murder or when the homicide was the result of the actions of a third party over whom the accused had little or no control. . . . The use of the felony-murder doctrine is considered particularly harsh in the capital punishment context, where constitutional safeguards and public attitudes demand that the extreme penalty be meted out only for the most reprehensible crimes. As one commentator has observed, "[T]he death penalty is an untenable sanction for negligent or accidental homicide." It was, no doubt, this dissatisfaction with the doctrine which led our legislature to prohibit its use in the trial of capital felonies.

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[49]See the Alabama, Colorado, Connecticut, Maryland, Ohio, Pennsylvania, South Dakota and Washington statutes cited in notes 43, 45, 46, *supra.*

Ex parte Ritter, 375 So. 2d 270, 274 (Ala. 1979).[50]

c. Jury determinations

Although marked, the accelerating legislative trend against authorizing the death penalty for vicarious, unintended felony-homicides does not completely reflect the extent to which contemporary standards of decency have evolved away from actually imposing the punishment for that species of crime. American legislatures, of course, consistently rely upon "[j]ury sentencing . . . in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a

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[50]Accord, Ark. Stat. Ann. §41-1501, Official Commentary of the Attorney General (the inclusion of a *mens rea* requirement for capital felony murder in the Arkansas statute was compelled by doubts whether "a miscreant who engaged in a non-capital offense should be subject to capital punishment for a death in respect to which he had no culpability or only such culpability as would ordinarily lead to manslaughter rather than murder liability").

"[T]he climate of international opinion" (*see Coker v. Georgia, supra,* 433 U.S. at 596 n.10) is also strongly opposed to death as a sanction for unintentional homicides. Thus, "[c]onstructive malice is unknown in . . . Western Europe . . . . Although the provisions of law in these countries differ from one another in many respects, intent to kill . . . is invariably a necessary element in those more serious forms of homicide which correspond more or less closely to [capital] murder . . . ." ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 43. Even Commonwealth countries inured to the English concept of implied malice early removed unintentional felony-homicides from the category of capital murder. See LAW REVISION COMMISSION OF THE STATE OF NEW YORK, THIRD ANNUAL REPORT 670 (1937) (New Zealand, 1908; Canada, 1927); Indian Penal Code, §§299-300.

maturing society.' " *Gregg v. Georgia, supra,* 428 U.S. at 190, quoting *Witherspoon v. Illinois,* 391 U.S. 510, 519 n.15 (1968), and *Trop v. Dulles, supra,* 356 U.S. at 101 (plurality opinion). It is in the crucial interface between statutory authorizations and juries' assessments of the fitness of the extreme penalty for particular offenders that the full force of contemporary society's rejection of the death penalty for accomplice liability in unintended felony-murders becomes clear.

Accessible data illustrate the American jury's repudiation of capital sentencing in such cases in two ways.[51] First, a search of all reported opinions in post-1954 cases of executions for homicides reveals only 6 cases out of 362 in which clearly identifiable felony-murder nontriggermen were executed. The last such execution occurred in 1955, a

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[51]Harry Kalven, Jr. and Hans Zeisel first brought this trend to light. See Kalven & Zeisel, *The American Jury and the Death Penalty*, 33 U. CHI. L. REV. 769 (1966), reprinted in H. KALVEN & H. ZEISEL, THE AMERICAN JURY 435-49 (1971). In a study of 111 jury trials in potentially capital cases, the authors compared the guilt and sentencing verdicts of the juries with the verdicts that the presiding judges considered consistent with the law. *Id.* at 770. Noting that "[t]he felony murder rule is the harshest instance of strict liability in our criminal law," Professors Kalven and Zeisel concluded that often "the jury will not accept the legal fiction of intent" embodied in that rule and, in accomplice cases, frequently "rebels at imposing the death penalty for the vicarious responsibility of the defendant." *Id.* at 775-76. The authors found that felony-murder/accomplice factors generated far more jury leniency than any other factor measured during the study. *Id.* at 777. They were surprised to find that jury-judge disagreement with regard to felony-murder did not occur on the issue of guilt or innocence—juries being as likely as judges to convict defendants of felony murder—but only on the issue of the death penalty. *Id.* at 771 n.6, 776 n.10.

quarter-century ago.[52] By contrast, there were 72 executions for rape in this country between 1955 and the decision in

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[52]This survey was conducted by searching for reported opinions in all post-1954 cases of executions for homicide listed in the inventory in W. BOWERS, EXECUTIONS IN AMERICA 200-401 (1974), as well as in the four cases in which executions have occurred since that book was published. The complete survey, including the citation of all 362 cases found, is set forth in Appendix D to this brief. In his concurring opinion in *Lockett*, Justice White reports an earlier survey conducted by counsel for petitioner. See 438 U.S. at 624 & nn.6, 7. Recent scholarship has uncovered several additional written opinions in cases in Bowers' inventory, see Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 COLO. L. REV. 17 (1979); and three persons have been executed since 1978. A numbering error in the *Lockett* survey has also been corrected in displaying the present survey in Appendix D.

In addition to six clearly identifiable felony-murder nontriggermen, our survey found two executions for vicarious liability in non-felony murders where the executed person intended that the homicide occur and hired others to commit it (a class of case having no bearing on petitioner's submission herein), and 14 other cases in which the facts were not reported in sufficient detail to reveal whether the executed person was or was not a nontriggerman.

In Dressler, *supra*, the author undertook a similar study. Professor Dressler has generously provided counsel for petitioner with the data underlying that study. It diverges from our survey in that (i) it includes several rape cases not relevant to our survey, and (ii) it counts as "accessories" (as opposed to "perpetrators") eight offenders who by their own hands "inflicted wounds on the victim," but who happened not to strike "the more likely lethal" blow. *See id.* at 66-68 & n.299. In the survey in Appendix D, all persons actually participating in the battery of the victim are "triggermen." Despite these methodological discrepancies, the surveys reach the same essential conclusion: those persons convicted of felony-murder over the past quarter century who had no role in the death of the victim either by action or solicitation (and who therefore probably did not intend that life be taken) were almost never executed. See *id.* at 67-68 (reporting that "non-causal") (*i.e.*, not murder-for-hire) "accessories"—including ones who actively assisted in killing the victim, but did not strike the blow that actually killed—comprised only 3 percent of persons executed between 1955 and 1979).

Coker v. Georgia,[53] so that executions for homicides not clearly committed or intended by the person executed have been far less prevalent in this country in modern times than the practice declared unconstitutional in *Coker.*

Contemporary rejection of the death penalty for murder convictions like petitioner's — where the defendant did not personally kill, was not present when the actual killer killed, and had not participated with the actual killer in a plot or design encompassing the taking of life — is even more starkly illustrated by a survey of the nation's present death-row population. As of October 20, 1981, there were 796 persons confined in the United States under active sentences of death for homicide.[54] Of the 739 for whom sufficient data are available to make a determination, only 41 did not personally participate in the fatal assault upon the victim. Of the 40 among these 41 for whom sufficient data are available, only 16 were not physically present when the fatal assault was committed. Of these 16, only 3, including petitioner,

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[53]UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS BULLETIN, NO. SD-NPS-CP-3, CAPITAL PUNISHMENT 1974, at 16-17 (November 1975).

[54]See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. (October 20, 1981), at 1 n.*.

This survey was conducted, first, by searching the reported and unreported appellate opinions that have been rendered in cases of persons presently on death row; second, by consulting trial judges' sentencing reports, where available; third, by telephonically contacting attorneys involved in the cases in which no appellate decision has yet been announced; and finally, in a few cases, by consulting newspaper accounts of capital trials. The complete survey, including the citations or docket numbers (where available) of all 796 cases is set forth in Appendix E.

were sentenced to die in the absence of a finding that they had collaborated with the killer in a specific design to kill.[55]

As a result, then, of innumerable expressions by juries of "the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois, supra,* 391 U.S. at 519, the penalty of death in cases like petitioner's has become today all but extinct.[56] Its exceedingly rare appearance can only be described as "freakish" and "wanton," like "being struck by lightning." *Furman v. Georgia, supra,* 408 U.S. at 309-10 (Justice Stewart, concurring).

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[55]The remaining 12 either hired, or otherwise solicited, someone else to kill the victim, or participated in a felonious plan that included a design to kill the victim.

We recognize, of course, that the ultimate shape of the constitutional rule for which we contend would be more rationally framed as Justice White framed it in *Lockett v. Ohio, supra,* 438 U.S. at 624, in terms of intention to kill *vel non,* than in terms of (i) physical participation in the lethal act, (ii) presence at the site of the act, and (iii) participation in a plot to kill, if absent. But reliable data-gathering in large numbers of cases is enhanced by concentration upon more objective, frequently reported and readily identifiable facts; and for this reason we have focused our survey on three such facts that are each highly relevant to an intention to kill. See *id.* at 625 n.7 (Justice White, concurring). The remarkable absence of all three factors, or course, characterizes petitioner Earl Enmund's death sentence and provides the narrowest ground upon which the Court might set it aside as excessive under the constitutional principle developed in this Point I, if the Court preferred to reserve broader questions in the absence of less accessible data.

[56]"The ultimate judgment of the American people concerning the imposition of the death penalty upon . . . defendants [who do not intend to cause death] is revealed . . . by the frequency with which society is prepared actually to inflict the punishment of death. See *Furman v. Georgia,* 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime." *Lockett v. Ohio, supra,* 438 U.S. at 625 (Justice White, concurring).

(continued)

3. Conclusion

Thus, the "objective evidence of the country's present judgment" (*Coker v. Georgia, supra,* 433 U.S. at 593) uniformly establishes that an individual's unadorned participation in a non-homicidal felony—be it the felony of rape as in *Coker* or the robbery here—without the intent to take life or to have another take it, cannot justify the death penalty based upon the fortuity that a homicide resulted from the acts of a confederate in the felony. Such participation is unquestionably "deserving of serious punishment" (*id.* at 598), but the objective judgment of history and contemporary society is that it does not rise to the enormity required for the extreme punishment of death.

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The state courts have frequently remarked on this same phenomenon over the past decade. *E.g., Justus v. State*, 276 S.E.2d 242, 246 (Ga. 1981); *Jarrell v. State*, 216 S.E.2d 258, 270 (Ga. 1975); *State v. Rust*, 250 N.W.2d 867, 875 (Neb. 1977); *State v. Irwin*, 282 S.E.2d 439, 447 (N.C. 1981); *State v. Shaw*, 255 S.E.2d 799, 804 (S.C. 1979); *State v. Groseclose*, 615 S.W.2d 142, 149 (Tenn. 1981); *Clark v. Commonwealth*, 257 S.E.2d 784, 794-95 (Va. 1979). Furthermore, state appellate courts have not hesitated to reduce death sentences to life imprisonment for that reason, in the rare instances in which juries have imposed them on persons who did not take life or intend to take life. *Hall v. State*, 244 S.E.2d 833, 838-39 (Ga. 1978); see also *id.* at 839 & n.2, discussing *Hill v. State*, 229 S.E.2d 737 (Ga. 1976); *People v. Glecker*, 411 N.E.2d 849, 861 (Ill. 1980); *State v. Sonnier*, ___ So. 2d ___, No. 80-K-1846 (La. June 22, 1981); *Wallace v. State*, 618 S.W.2d 67 (Tex. Crim. App. 1981); *Warren v. State*, 562 S.W.2d 475, 476-77 (Tex. Crim. App. 1978).

C. Death Is a Purposeless and Excessive Punishment for Vicarious Liability in an Unintentional Felony Murder Because it Makes No Measurable Contribution to the Acceptable Goals of Punishment

"The death penalty is said to serve two principal social purposes"—"deterrence of capital crimes by prospective offenders" and "retribution." *Gregg v. Georgia,* 428 U.S. at 183. As applied to punish vicarious liability for unintentional felony-homicide, the death penalty serves neither purpose. It "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposelsss and needless imposition of pain and suffering." *Coker v. Georgia, supra,* 433 U.S. at 592.

1. Imposing the death penalty for unintended homicides committed by others during the course of felonies does not measurably increase the likelihood that such homicides will not occur in the future

Because " '[r]etribution is no longer the dominant objective of the criminal law,' " *Gregg v. Georgia, supra,* 428 U.S. at 183, *quoting Williams v. New York,* 337 U.S. 241, 248 (1949), the Eighth Amendment requirement of penological justification focuses heavily upon the claim of deterrent effectiveness of the death penalty for a given offense. In examining the deterrent value of the death penalty, the Court has taken the view that the proper inquiry is not whether capital punishment deters crime as a matter of some overall, undifferentiated generalization, but rather, for whom and for which crimes it can rationally be found to serve as a deterrent. *E.g., Lockett v. Ohio, supra,* 438 U.S. at 625 (Justice White, concurring); *Gregg v. Georgia, supra,*

428 U.S. at 185-86; *Furman v. Georgia, supra,* 408 U.S. at 455 (Powell, J., dissenting), quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT at 24.

Pursuing this crime-specific analysis in *Gregg,* the Court upheld the constitutionality of the death penalty for deliberate murder in part because, as to that offense, common sense suggests that "the possible penalty of death may well enter into the cold calculus that precedes the decision to act." 428 U.S. at 186. The Court explicitly recognized, however, that in some situations where a homicide is *not* the result of a "calculated," "carefully contemplated," or "cold-blooded" decision to kill, "the threat of death has little or no deterrent effect." *Id.* at 184-86 & nn.30, 33.[57]

Since "[a]ll foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing," O. HOLMES, JR., THE COMMON LAW 55 (1881), "if a man does not foresee the consequences of his act he cannot appreciate that punishment lies in store for him if he does it."[58] Such is the

[57]See *Morissette v. United States, supra,* 342 U.S. at 250-51 ("A relationship between some mental element and punishment for a harmful act . . . has afforded the rational basis for a tardy and unfinished substitution of deterrence . . . in place of retaliation and vegeance as the motivation for public prosecution").

[58]G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (1961). Modern criminal law scholarship repeatedly bears out Glanville Williams' observation. *E.g.,* A. GOLDSTEIN, THE INSANITY DEFENSE 12-13 (1967); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 45 (1968); Hall, *Negligent Behavior Should Be Excluded from Penal Liability,* 63 COLUM. L. REV. 632, 641 (1963); Henry M. Hart, *The Aims of the Criminal Law,* 23 L. & CONTEMP. PROB. 401, 421-22 (1958). Scholarship in other legal fields has endorsed the same premise. *E.g.,* G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 56-57 (1970).

case of the person who associates himself in a felonious scheme with no intention to take life or contemplation that it will be taken by another.[59]

Nor is there any basis in fact for assuming that the likelihood of death occurring in a felony is so substantial that felony offenders who would not be deterred by the penalty affixed to the felony itself will nonetheless advert to that likelihood and be deterred by the death penalty that "lies in store" for it. Rather, the probability of death occurring during the commission of *any* serious felony, including robbery, is exceedingly low—about five in one thousand.[60]

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[59]Because of the absence of any requirement of homicidal intention, felony-murder has frequently been singled out as a paradigm of the offense for which the death penalty in particular has little or no deterrent efficacy. *E.g.*, Hon. James R. Browning, *The New Death Penalty Statutes: Perpetrating a Costly Myth*, 9 GONZ. L. REV. 651, 699 (1974); H.L.A. Hart, *Murder and Its Punishment: England and the United States*, 52 NW. U.L. REV. 433, 437 (1957); Morris, *Felon's Responsibility for Acts of Others*, 105 U. PA. L. REV. 50 (1956); Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1556, 1605-06 (1974); Wechsler, note 33, *supra*, at 785 & n.6.

[60]Relying upon three studies of solved and unsolved serious felonies committed in Cook County, Illinois in 1926 and 1927, Philadelphia between 1948 and 1952, and New Jersey in 1975, the drafters of the Model Penal Code concluded that "there is no basis in experience" for concluding that unintended deaths accompany felonies sufficiently often to justify capital punishment as a deterrent to that offense. ALI, MODEL PENAL CODE §210.2, Comment at 38 & n.96 (1980). Notably, New Jersey's figures cover a period during which that State did not impose the death penalty for any crime. The three studies reported the following data regarding the frequency of death resulting from robbery:

(continued)

And, as we have noted above, even in that .5% of cases, the likelihood of subsequent imposition of the death penalty is negligible. Such less-than-occasional imposition of the death penalty in a tiny fraction of highly abberational cases cannot be rationally supposed to have a deterrent effect. See generally, *Furman v. Georgia, supra,* 408 U.S. at 410 (Justice White, concurring). "[C]apital punishment can serve as a deterrent *only* when murder is the result of premeditation and deliberation." *Fisher v. United States,* 328 U.S. 463, 484 (1946) (Justice Frankfurter, dissenting) (emphasis added). Particularly in the case of unintended killings committed by a co-felon, the deterrent justification for that extreme punishment does not exist.

(footnote continued from proceeding page)

	No. of Crimes Reported	*No. Accompanied By Homicide*	*%*	*No. per 1000*
Cook County, Ill. (1926-1927)	14,392 (est.)	71	.49	4.9
Philadelphia (1948-1952)	6,432	38	.59	5.9
New Jersey (1975)	16,273	66	.41	4.1

Id. Accord, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 19 (1967) (study of robberies in Washington, D.C. in the 1960's showing that less than one half of one percent resulted in homicide).

2. Retributive justice is not measurably served by punishing unintentional felony-homicides with death

The absence on Earl Enmund's part of any intention to take life also deprives his death sentence of any retributive justification.

"The retributive theory presupposes moral guilt." G. WILLIAMS CRIMINAL LAW: THE GENERAL PART (30) (1961). It "rests on the idea that . . . because man is responsible for his acts, he ought to receive his just deserts." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37 (1968), cited in *Gregg v. Georgia, supra,* 428 U.S. at 183 n.29. In making Eighth Amendment judgments about the retributive value of the death penalty for a given offense, the inquiry therefore focuses on whether a person "deserved [that] punishment" in some moral and personal sense. *Rummel v. Estelle, supra,* 445 U.S. at 288 (Justice Powell, dissenting); see *Furman v. Georgia, supra,* 408 U.S. at 308 (Justice Stewart, concurring).

In assessing moral guilt and personal responsibility, our system of criminal law has traditionally relied on the mental element of crimes. See pp. 17-18, *supra*. Our traditions have insisted that "[p]unishment . . . obtain [ ] only when the deed is done with a state of mind that is reprehensible as well as unfortunate."[61] More specifically, Anglo-American criminal law has for the most part considered "an injury . . . inflicted by intention"[62] to be "critical to criminal culpability;" and, without exception, it has considered such an intention critical to "the *degree* of criminal culpability."

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[61]ALI, MODEL PENAL CODE, §210.2, Comments, at 36 (1980).

[62]*Morissette v. United States, supra,* 342 U.S. at 250.

Mullaney v. Wilbur, supra, 421 U.S. at 698, 702 (emphasis added).[63] It has accordingly been fundamental not only to the theory of retributive justice but to our system of criminal law as a whole that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H.L.A. HART, PUNISHMENT AND

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[63]In analyzing Eighth Amendment excessiveness claims, this Court has often remarked on the absence of a requirement of intentional wrongdoing in criminal statutes found unconstitutionally harsh. *E.g., Robinson v. California,* 370 U.S. 660, 667 (1962); *Weems v. United States, supra,* 217 U.S. at 363, 365; *O'Neil v. Vermont, supra* 144 U.S. at 337 (Justice Field, dissenting). See also *Godfrey v. Georgia,* 446 U.S. 420, 433 (1980) (death sentence invalidated because based on an interpretation of an aggravating circumstance that would apply to "any murder," rather than only to those murders evidencing "a consciousness [on the offender's part] materially more 'depraved' than that of any person guilty of murder").

On the other side of the coin, the Court and its individual members have relied on the intentional nature of a given offense to justify a conclusion that punishing it severely is justified under the Eighth Amendment. *E.g., Gregg v. Georgia, supra,* 428 U.S. at 184 n.30, 187; *Coker v. Georgia, supra,* 433 U.S. at 602 n.1, 603 (Justice Powell, concurring). *See Green v. Georgia,* 442 U.S. 95, 97 (1979) (intent to kill a "critical issue" at penalty phase of a capital trial); *Lockett v. Ohio, supra,* 438 U.S. at 616 (Justice Blackmun, concurring) ("nature of [defendant's] *mens rea* in regard to the commission of homicidal act" is particularly important at penalty stage of a capital trial); *Furman v. Georgia, supra,* 408 U.S. at 388 (Chief Justice Burger, dissenting) ("motive or lack of motive of the perpetrator" is a frequent basis on which juries decide whom to sentence to die).

RESPONSIBILITY 162 (1968).[64] In petitioner's case, it cannot be said that any retributively justifiable prescription of punishment proportioned to the degree of his personal responsibility and moral guilt has occurred. Rather, Earl Enmund has received the most severe penalty "even though," as the jury was instructed, "there [was] . . . no premeditated design or intent to kill," and no action on his part to kill. A.6. In such a situation, a death sentence does

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[64]As this Court demonstrated in *Smith v. California*, 361 U.S. 147 (1959) (imposing a scienter requirement in a First Amendment context), the imposition of an intent requirement as a prerequisite to the constitutional imposition of the death penalty would have no bearing on the State's general ability to define crimes and their mental elements as it chooses. What the Court said on this point in *Smith* concerning state action inhibiting expression is at least as applicable to "the action of the sovereign in taking the life of one of its citizens," *Gardner v. Florida*, *supra*, 430 U.S. at 357-58: certain "legal devices and doctrines [that] in most applications [are] . . . consistent with the Constitution . . . cannot [constitutionally] be applied." *Smith v. California*, *supra*, 361 U.S. at 150-51. Accordingly, as did *Gardner*, *Beck v. Alabama*, 447 U.S. 625, 638 n.14 (1980), and *Lockett v. Ohio*, *supra*, 438 U.S. at 605 n.13, this case presents a proper occasion for "draw[ing] a 'bright line' between the punishment of death" and all other situations potentially affected by the Eighth and Fourteenth Amendments. *Rummel v. Estelle*, *supra*, 445 U.S. at 275.

Furthermore, an intent requirement would present "no unique hardships" in the administration of capital-murder statutes. *Mullaney v. Wilbur*, *supra*, 421 U.S. at 702. As the Court has noted in a variety of contexts, "courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *American Communications Ass'n v. Douds*, 339 U.S. 382, 411 (1950); accord, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-67 (1975); *United States v. United States Gypsum Co.*, *supra*; *Mullaney v. Wilbur*, *supra*, 421 U.S. at 702; *Smith v. California*, *supra*, 361 U.S. at 154; *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949).

not measurably, or even "marginally" or "negligibly," serve retributive justice, *Furman v. Georgia*, 408 U.S. at 312 (Justice White, concurring).

D. Conclusion

Nothing excepting Earl Enmund's participation in the robbery that led to Mr. and Mrs. Kersey's death at the hands of Sampson Armstrong has been put forward by the State of Florida to justify his death sentence. That justification is constitutionally insufficient. *Coker v. Georgia, supra.* In the absence of any other justification, a judgment to kill Earl Enmund—who himself did not kill, attempt to kill, or intend to kill—is "grossly out of proportion to the severity of the crime," and so utterly "needless" and "purposeless," *id.* at 592, that it cannot "accord with 'the dignity of man,' which is the basic concept underlying the Eighth Amendment." *Gregg v. Georgia, supra,* 428 U.S. at 173.

II

PETITIONER'S DEGREE OF PARTICIPATION IN THE KILLINGS WAS GIVEN INADEQUATE CONSIDERATION AND INADEQUATE WEIGHT BY THE FLORIDA COURTS, THEREBY VIOLATING HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

In *Lockett v. Ohio, supra,* 438 U.S. at 604 (plurality opinion), four Justices of this Court concluded that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

(emphasis in original) (footnotes omitted). A fifth member of the Court, Justice Blackmun, concurred on a narrower ground which focused specifically upon the most compelling mitigating factor presented in Sandra Lockett's case and now in Earl Enmund's: the sentencer must be permitted to consider

> the defendant's degree of participation in the homicide and the nature of his *mens rea* in regard to the commission of the homicidal act.

438 U.S. at 616. The following term, in *Green v. Georgia*, 442 U.S. 95, 97 (1979), a majority of eight Justices recognized that the mitigating factor identified in Justice Blackmun's *Lockett* concurrence is indeed a "critical issue" at the penalty phase of a capital trial. The Court accordingly invalidated a death sentence imposed without consideration of evidence that the defendant was not present during the killing and lacked any intent to kill.

In this case, both the trial court and the Florida Supreme Court approached the sentencing decision in a manner that denied any meaningful consideration to the mitigating factor deemed crucial in *Lockett* and *Green*. We examine below the processes through which this occurred, and their consequences. Viewed as either procedure or result, the decision to consign petitioner to death took inadequate account of the

degree of his participation in the crime for which he was being sentenced, and thus subjected him to cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

A. The Trial Court and the Florida Supreme Court Refused to Consider as an Independent Mitigating Circumstance Earl Enmund's Lack of Participation in the Killings and Total Absence of Homicidal Intent

Fla. Stat. Ann. §921.141(6)(d) directs the sentencer to consider as a mitigating circumstance the fact that "[t]he defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." The trial court found that this mitigating circumstance was not present in petitioner's case because his "participation in the capital felony was major." A.54; 399 So. 2d at 1373. In so doing, it clearly (i) telescoped its consideration of the mitigating effect of petitioner's limited involvement in the Kersey killings into the exclusive mold of section 921.141(6)(d); and (ii) so construed that provision as to equate participation in the *robbery* with participation in the killings.[65] Both of these steps clearly flout this Court's square

[65]The latter interpretation is underscored by the trial court's finding that petitioner "planned the capital felony." A. 54; 399 So. 2d at 1373. There was no evidence at trial that Earl Enmund planned to kill anyone; at best there was evidence that he planned the robbery. The court further noted that petitioner "actively participated in an attempt to avoid detection by disposing of the murder weapons," *ibid.*, but that alone hardly renders his degree of participation "major." Indeed, Sandra Lockett also helped to hide the weapon used by the triggerman in her case. *Lockett v. Ohio*, *supra*, 438 U.S. at 590-91.

holding in *Lockett*.[66]

Viewing the evidence in the light most favorable to the prosecution, petitioner may have played a major role in a robbery; but the record simply will not support a finding that Earl Enmund played a major role in the killing of Mr. and Mrs. Kersey. Any such finding would have "no basis" in the constitutional sense, *e.g.*, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), unless participation in the underlying robbery plan is deemed tantamount to participation in an unplanned, "spontaneous" killing by another robber (see pp. 3-4, *supra*) within the meaning of Fla. Stat. Ann. §921.141(6)(d). The latter must have been the Florida Supreme Court's view when it held that "[t]he finding that no mitigating circumstances were present was not error." A.55; 399 So. 2d at 1373.

The procedure for weighing mitigating circumstances against aggravating circumstances is well established under Fla. Stat. Ann. §921.141(3). See, *e.g.*, *Elledge v. State*, 346 So. 2d 998 (Fla. 1977). Under this procedure, so long as there is a mitigating circumstance present in the case, reversal of an aggravating circumstance relied on by the trial court—as occurred here twice—requires reversal of the sentence as well. *Id.* at 1002-03. Because the Florida Supreme Court did not reverse petitioner's sentence, it plainly did *not* consider petitioner's relative uninvolvement in the Kersey killings as a mitigating circumstance, albeit an insufficient one; rather, the court refused to consider it as a mitigating circumstance at all, stating flatly that "[t]here are no mitigating circumstances" in this case. A.55; 399 So. 2d at 1373. Such an exclusive, narrow interpretation of section 921.141(6)(d) manifestly

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[66]The second step is also manifestly at odds with *Coker v. Georgia*, *supra*. See pp. 7-10, *supra*.

ignores the command of *Lockett* that the sentencer consider "any of the circumstances of the offense" proferred by the defendant in mitigation, 438 U.S. at 604, "as an independently mitigating factor," *id.* at 607. By foreclosing consideration of factors as crucial as Earl Enmund's limited participation in the killing and his total lack of intent to kill, Florida has done precisely what *Lockett* forbids. It has created and enhanced

> the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605.

B. The Trial Court and the Florida Supreme Court Failed to Engage in Any Precise, Consistent Fact-finding, Supported by the Record, as to the Extent of Earl Enmund's Participation in the Killing and Whether that Degree of Participation Merits Imposition of a Sentence of Death

In his concurring opinion in *Lockett v. Ohio*, *supra*, 438 U.S. at 616, Justice Blackmun recognized the constitutional necessity of establishing

> some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life.

This case illustrates that necessity only too well. As we shall develop below, Earl Enmund stands sentenced to die upon the basis of the most cursory, sloppy and inconsistent fact-finding imaginable in a case with human life at stake. The

Florida Supreme Court has repudiated those findings by the trial judge, but has nonetheless affirmed Enmund's death sentence without offering any substitute rationale to explain why the death penalty is appropriate for this defendant. If the Eighth and Fourteenth Amendments demand any "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina, supra*, 428 U.S. at 305, that command had been violated here.

(i)

Initially, the trial judge limited his findings to a brief oral statement, delivered in open court at sentencing on September 30, 1975, which recited in conclusionary form four of the aggravating circumstances set forth in Florida's death-sentencing statute. The judge made no findings at this time concerning petitioner's degree of participation, but merely tracked the language of Fla. Stat. Ann. §921.141(5)(d) in concluding that "this capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of or the attempt to commit or flight after committing or attempting to commit a robbery." A.28. He added generally that "[t]he Court can find no mitigating circumstances as it applies [*sic*] to this Defendant." *Ibid.*

Although the trial judge stated on the record that "the Court will further set forth its reasons in a written judgment to be filed in the court files," A.28, no such judgment was forthcoming. Accordingly, on appeal the Florida Supreme Court remanded and directed the judge to prepare written findings. A.29.[67]

[67]Fla. Stat. Ann. §921.141(3) requires "specific written findings of fact" whenever the death penalty is imposed. See *Proffitt v. Florida*, 428 U.S. 242, 250, 259 (1976) (plurality opinion).

On April 22, 1977, nearly 19 months after pronouncing sentence, the trial judge finally issued his written findings. As noted at pp. 47-49, *supra*, he determined in the section on mitigating circumstances that petitioner was "an accomplice" whose participation was nonetheless "major" because he planned the robbery and actively participated in an effort to dispose of the murder weapons. A.32. On this basis, no mitigating circumstance was found. *Ibid.* In the section on aggravating circumstances, the court repeated its oral finding that the capital felony was committed "while the defendant Enmund was engaged, or was an accomplice, in the commission of, or an attempt to commit an armed robbery. FS 921.141(5)(d)." A.30. Then, in support of its finding that the capital felony was "especially heinous, atrocious or cruel" (Fla. Stat. Ann. §921.141(5)(h)—a finding later reversed by the Florida Supreme Court[68]—the trial court made the pronouncement, completely at odds with its other statements, that "it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey." A.31.

This pronouncement was utterly baseless and nothing short of irresponsible when stated by a court charged with the duty of deciding whether a defendant shall live or die—an "action of the sovereign . . . [which] differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). There was not a shred of evidence that Earl Enmund ever set foot on the Kersey's property, and the only prosecution evidence as to his whereabouts placed

[68]A.55; 399 So. 2d at 1373.

him in a parked car two hundred yards away while the killings were taking place. R. 1025-27, 1030, 1037.[69]

The Florida Supreme Court properly disregarded the trial judge's groundless attribution of a gunman's role to Enmund, finding instead that

> the only evidence of the degree of [petitioner's] . . . participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money.

A. 49-50; 399 So. 2d at 1370. However, the court was apparently blind to the legal significance of this factual reversal. Having found that the only evidence placed petitioner away from the site of the killings, the Florida Supreme Court necessarily undercut a key premise of the trial court's decision to condemn petitioner to die. Under any orderly system of capital sentencing which considers—as *Lockett* requires—that the degree of a defendant's participation in a homicide is relevant to his proper punishment for it, the least that was required of the Florida Supreme Court was the

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[69]The trial court's proffered basis for its conclusion that petitioner Enmund participated in the shooting was (1) that Jeanette Armstrong had been "seriously wounded" by Mrs. Kersey's opening shots (A. 31); (2) that both Kerseys were shot by bullets from two different caliber guns; and (3) that they were shot "while in the prone position." (*ibid.*). But (1) there is no evidence in the record that Jeanette did not fire any shots, either before or after being hit; (2) even if one speculates that Jeanette never fired, there is no reason of record to suppose that Sampson Armstrong did not shoot both guns—picking up either Jeanette's or Mrs. Kerseys'; after all, it is Sampson Armstrong who said he shot both of the Kerseys and that he "made sure that the people was dead" (R. 1207-08); and (3) in any event, as the Florida Supreme Court expressly found, the evidence did *not* establish that Mr. and Mrs. Kersey were shot in a prone position.

course of action advocated by Justice Overton, dissenting from the affirmance of petitioner's death sentence:

> I . . . would remand for resentencing in view of the specific finding of the majority that the appellant did not actually participate in the shooting. In his sentencing order the trial judge found to the contrary, expressing the view in his findings of aggravating circumstances that the appellant was present and assisted in the commission of the murder. In my opinion, these contrary findings require a resentencing proceeding.

A. 56; 399 So. 2d at 1373.

(ii)

In *Gregg v. Georgia*, *supra*, 428 U.S. at 190, this Court recognized that

> accurate seentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.

The sentencing authority accordingly must scrutinize not only the character, record and history of the defendant, but also the "particularized nature of the crime." *Id.* at 206. Thus, the sentencer is to be "guided and channeled by a system that focuses on the *circumstances of each individual homicide* and individual defendant in deciding whether the death penalty is to be imposed." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (plurality opinion) (emphasis added). See also *Woodson v. North Carolina*, *supra*, 428 U.S. at 304; *Stanislaus Roberts v. Louisiana*, 428 U.S. 325, 333-34, (1976). Furthermore, in Florida any risk of an arbitrary or capricious result is supposed to be "minimized by Florida's appellate review system, under which the evidence of aggravating and mitigating circumstances is reviewed and reweighed

by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.' *Songer v. State*, 322 So. 2d 481, 484 (1975)." *Proffitt v. Florida*, *supra*, 428 U.S. at 253. The ultimate object of these safeguards is, of course, to guarantee that death sentences are based upon reliable fact-finding. *Beck v. Alabama*, 447 U.S. 625, 637-38 & n.13 (1980); *Green v. Georgia*, 442 U.S. 95 (1979); *Lockett v. Ohio*, *supra*, 438 U.S. at 604; *Gardner v. Florida*, *supra*, 430 U.S. at 359; *id.* at 364 (Justice White, concurring); *Woodson v. North Carolina*, *supra*, 428 U.S. at 305.

The slipshod approach of the Florida courts in this case makes a mockery of these principles. It would seem elementary that in *any* case in which the defendant plausibly contends that he did not kill, attempt to kill or intend to kill, and was not even present when the killing took place, the sentencer and reviewing court should at the very minimum make a serious effort to (i) find out what happened, and (ii) assess appropriate weight to that finding in relation to all other aggravating and mitigating circumstances in the case. Whether one agrees with Justice White's position in *Lockett* that death cannot constitutionally be imposed without a considered finding that the defendant possessed a conscious purpose to bring about the death of the victim (see Point I, *supra*) or with Justice Blackmun's position in that case that the numerous different levels of intent preclude the drawing of such a "bright-line" rule (438 U.S. at 614-15 n.2), an accomplice on trial for his life is at least entitled under the Eighth and Fourteenth Amendments to a reliable inquiry into the extent of his culpability and a reasoned determination why, even if the record does not reflect that he intended to produce death, he should nonetheless be executed for his role in the crime. That was not done in this case.

C. The Execution of Earl Enmund upon this Record Would Constitute Excessive and Disproportionate Punishment

This Court has long recognized that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States, supra*, 217 U.S. at 367. Under any "objective consideration of the particularized circumstances of the individual offense and the individual offender" revealed by this record, *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality opinion), Earl Enmund's death sentence should be set aside as an excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

As noted previously, see pp. 51-52, *supra*, there is no evidence here that petitioner killed, attempted to kill or intended that anyone be killed. Even assuming *arguendo* in contrast to Point I, *supra*, that other circumstances might conceivably in some cases justify the execution of such a defendant, this is not such a case. Surely the fact of petitioner's involvement in the Kersey robbery alone is not sufficient. And while a lengthy record of violent crime might arguably outweigh a defendant's tangential participation in the capital offense, Earl Enmund has no such record: he served a one-year sentence for robbery eighteen years prior to the instant offense, and has since led a law-abiding life in his community as a farmer and father of four. R. 1467-70.

The Florida Supreme Court has on numerous occasions set aside death sentences imposed upon nontriggermen in far more aggravated cases. See *Taylor v. State*, 294 So.2d 648 (Fla. 1974) (defendant armed and present during robbery; active participant); *Slater v. State*, 316 So. 2d 539 (Fla. 1975) (defendant present during robbery; active participant);

McCaskill v. State, 344 So. 2d 1276 (Fla. 1977) (defendant armed and present during robbery; active participant); *Williams v. State*, 344 So. 2d 1276 (Fla. 1977) (following armed, active participation in robbery, defendant returned to scene and shot a witness who knew him in order to avoid being identified); *Malloy v. State*, 382 So. 2d 1190 (Fla. 1979) (defendant armed and present during robbery-kidnapping; Florida Supreme Court found he had intent to kill, *id.* at 1193); *Jacobs v. State*, 396 So. 2d 713 (Fla. 1981) (defendant armed, present at scene, fired at victims, and "actively participated in the murders," *id.* at 716); *Barfield v. State*, 402 So. 2d 377 (Fla. 1981) (defendant was active participant in murder-for-hire scheme; hired killers, showed them where to find victim, and suggested appropriate location for killing him); *Smith v. State*, ____ So. 2d ____, No. 56,005 (Fla. July 16, 1981) (defendant was active participant in beating of victim; ordered her execution in order to eliminate her as a witness).

In *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), this Court held that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor *and apply* its law in a manner that avoids the arbitrary and capricious imposition of the death penalty" (emphasis added). Florida has failed that test in this case. Earl Enmund's limited participation in the killings and total lack of intent to kill render this a constitutionally indefensible case for society's most "extreme sanction, suitable to the most extreme of crimes." *Gregg v. Georgia*, *supra*, 428 U.S. at 187.[70] And in comparison to the Florida cases described above, the execution of Earl Enmund would be palpably arbitrary and

[70]See also *State v. Dixon*, *supra*, 283 So. 2d at 7; "... the Legislature has chosen to reserve ... [the death penalty's] application to only the most aggravated and unmitigated of most serious crimes."

excessive. There is simply "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia, supra*, 446 U.S. at 433.

CONCLUSION

The judgment of the Supreme Court of Florida, insofar as it leaves the sentence of death undisturbed, should be reversed.

Respectfully submitted,

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APPENDIX B

STATUTORY PROVISIONS INVOLVED

At the time of petitioner's trial on September 24-30, 1975, the following provisions of the Florida Statutes were in effect: *Fla. Stat. Ann.* § *782.04*[1A]

[1A]Section 782.04 has been amended since petitioner's trial. It presently provides:

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in §775.082, §775.083, or §775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate

(continued)

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing,

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(footnote continued from preceding page)

such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

Fla. Stat. Ann. §*921.141*

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty— Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge *before* the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6)

and (7).[2A] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist;[3A] and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of

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[2A]Since petitioner's trial, this sentence has been amended. It presently provides:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6).

[3A]Since petitioner's trial, this sentence has been amended. It presently provides:

> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.

death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.[4A] In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of facts based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.08.

(4) Review of judgment and sentence—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

[4A]Since petitioner's trial, this sentence has been amended. It presently provides:

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.[5A]

(6) Mitigating circumstances—Mitigating circumstaces shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

[5A]Since petitioner's trial, Fla. Stat. Ann. §921.141(5) has been amended to include an additional subsection, "(i)." Subsection "(i)" provides:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

APPENDIX C

COMMUTATIONS OF FELONY-MURDER DEATH SENTENCES IMPOSED ON ACCOMPLICES WHO NEITHER TOOK LIFE NOR INTENDED TO TAKE LIFE

Over the past century, governors in this nation have regularly commuted felony-murder death sentences of accomplices to non-homicidal felonies (*e.g.*, robbery, burglary, etc.) who did not themselves commit a homicidal act. The frequency of such commutations, and the reasons given for them, reveal a widespread conviction among state chief executives that the penalty of death is excessive punishment for persons who neither took life nor attempted or intended to take life. The governors' explanations also reveal a pattern of uneven jury nullification in severed felony-murder/accomplice cases, necessitating the use of executive clemency to relieve one accomplice of the death penalty when another equally or more culpable participant in the felony escaped conviction, or at least the death penalty, at the hands of a different jury.

Extensive documentation makes the reasons for commutations in New York particularly accessible. The following instances are illustrative:

PUBLIC PAPERS OF GOVERNOR GROVER CLEVELAND

1883-84. John B. Griffith's death sentence commuted because "Griffith did not, with his own hand, throw the explosive into the house, but that . . . was done by one of his companions," and because the other participants were sentenced to prison terms. (P. 319.)

PUBLIC PAPERS OF GOVERNOR FLOWER

1893. William H. Parker's death sentence commuted because he was not the triggerman in a robbery homicide, and the triggermen had been sentenced to life imprisonment. (Pp. 468-69.)

PUBLIC PAPERS OF GOVERNOR WHITMAN

1916. Onne Talas' death sentence commuted on recommendation of the Court of Appeals because he was convicted of felony murder and sentenced to die solely for letting the actual perpetrators of the robbery and homicide into his employer's house. The perpetrators, who tied up Talas in the basement before strangling the victim, escaped apprehension. (Pp. 365-68.)

1917. Elias Jarza's death sentence commuted on recommendation of the district attorney because Jarza "did not fire the shot which killed" the victim; rather, Jarza's accomplice was responsible for the killing. (Pp. 555-56.)

PUBLIC PAPERS OF GOVERNOR ALFRED E. SMITH

1920. Mahmout Blaza's death sentence commuted because "the person who did the actual killing has been [sentenced to prison] . . . , whereas the one who participated in the robbery [Blaza] has been [sentenced to death] . . . ." (P. 547.)

PUBLIC PAPERS OF GOVERNOR FRANKLIN D. ROOSEVELT

1931. Hyram Hirsch's death sentence commuted on recommendation of the trial judge because his co-defendant Goltz was "completely exonerated of a crime of which I feel he is equally guilty, and Hirsch, on the other hand, [is] . . . compelled to suffer the extreme penalty." (P. 517.)

PUBLIC PAPERS OF GOVERNOR HERBERT H. LEHMAN

1933-1937. Governor Lehman commuted death sentences in accomplice/felony-murder situations on a dozen occasions during these years, citing the absence of intent, the offender's not himself having taken life, and the lower sentences of the persons who did directly participate in the homicide: *1933*: Cornelius Johnson (p. 459); Vincent Garcia (p. 450); Linwood Washington (p. 450); Paul LoGiudice (p. 450);

1934: Antonio Gumbo, Sam Silverman and Lovell Landers pp. 601-02); *1935*: Matios Leylegian and Nishan Sarkisian; *1937*: Wentworth Springer, Lawrence Jackson and Robert Taliafero (p. 584).

PUBLIC PAPERS OF GOVERNOR THOMAS E. DEWEY

1947. Floyd Edgar Martin's death sentence commuted based on evidence that his accomplice committed the homicide. (P. 443.)

1949. Daniel Gentile's death sentence commuted in response to the district attorney's letter: "[T]he trial evidence does not indicate that [Gentile] was personally armed at the time of the killing. . . . While this circumstance furnishes no legal justification . . . it would seem pertinent on . . . clemency." (P. 466.)

1953. Al Keshner's death sentence commuted because of "the complete absence of intent to cause physical injury" and Keshner's "total failure to apprehend the tragic consequences that might and did result" from a scheme to commit arson, in which Keshner took part and in which a police detective died. (P. 975.)

PUBLIC PAPERS OF GOVERNOR AVERELL HARRIMAN

1955. Conception Estrada Correa's death sentence commuted, although his accomplices' death sentences were left intact, "because of his relatively minor role in [a robbery homicide], as a look-out." (P. 501.)

PUBLIC PAPERS OF GOVERNOR NELSON A. ROCKEFELLER

1961. Louis Manuel Rosario's death sentence commuted "primarily [because of] the uncertainty in the trial record as to which of the three defendants fired the fatal shot;" Rosario's robbery-homicide accomplices had been sentenced to prison. (P. 800.)

1963. Lorenzo Cantanzaro's sentence of death commuted because he was "the driver of the getaway car and did not participate in the actual shooting;" the jury recommended mercy for the triggerman but not Cantanzaro. See Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 164 (1964).

What records are available in other states indicate a similar preoccupation with felony-murder and accessorial issues in grants of executive clemency. For example:

CALIFORNIA

BIENNIAL MESSAGE OF GOVERNOR HIRAM W. JOHNSON TO THE LEGISLATURE OF THE STATE OF CALIFORNIA, 1917, at 58 (commutation of George P. Friedell's sentence because "he did not participate in the actual killing . . . and the person directly responsible for the homicide received considerations of clemency some years ago"); C. DUFFY, 88 MEN AND 2 WOMEN 84-88 (1962) (commutation of Carl Fellow's death sentence because he was not the triggerman and the proof of any intent to kill was dubious at best); Braithwaite, *Executive Clemency in California*, 1 ISSUES IN CRIM. 77, 100 (1963) (reporting commutation of Charles Golston's death sentence by Governor Edmund G. Brown, Sr., in part, because of the executive's reluctance to allow the execution of an offender whose malice existed only by virtue of the felony-murder rule).

COLORADO

REPORT OF THE STATE BOARD OF PARDONS, 1893-1894, at 26 (John Withers' murder sentence reduced in part because "[h]e did not know that murder was intended by the other participants").

GEORGIA

Hall v. State, 244 S.E.2d 833, 839 n.2 (Ga. 1978) (reporting the Board of Pardon's commutation of Hall's death sentence, apparently because the evidence was controverted as to whether Hall or his accomplice, who received a life sentence, actually killed the victim).

ILLINOIS

DIVISION OF PARDONS AND PAROLES, BIENNIAL REPORT, 1920-1922, at 23 (commutation of Ignatz Potz's death sentence because "[e]xecution of Potz would have been a disgrace to the State. He did not fire the shot which killed Peterson, the record in the case to the contrary notwithstanding").

OHIO

Ohio: M. DiSALLE, THE POWER OF LIFE OR DEATH, 78 (1965) (reporting Governor Davey's 1935 commutation of Rudy Ashbrook's death sentence because he was not the triggerman and his accomplice, who was, received a prison term); *id.* (reporting Governor Thomas Herbert's 1947 commutation of Charles L. Ames' death sentence who was only an accomplice to a burglary during which a co-felon shot a police officer); (James Louis Long's death sentence commuted by Governor DiSalle in 1962, despite Long's history of recidivism, because he was only "the driver of the [getaway] car," while "the actual murderer [was] given life).

APPENDIX D

SURVEY OF PERSONS EXECUTED IN THE UNITED STATES SINCE 1954

Methodological Note:

This survey was conducted by searching for reported appellate opinions in all post-1954 cases of execution for homicide listed in the inventory in Bowers, *Executions in America* 201-400 (1974).

Reported decisions were found for 360 such cases. In two additional cases—Jose Luis Monge (Colorado) and Gary Gilmore (Utah)—there was no appeal but the facts have been widely reported.

Findings:

Of the 362 cases listed, it is clear in 339 that the individual executed for homicide personally committed a homicidal assault. In two the person executed had others commit a homicide for him. In sixteen others the facts were not reported in sufficient detail to determine whether the person executed was a nontriggerman.

The survey uncovered only six cases in which clearly identifiable non-triggermen were executed: Two in New York, two in New Jersey, one in Florida, and one in Tennessee. All six were executed in 1955.

ALABAMA

1. *Bowen v. State*, 274 Ala. 66, 145 So.2d 421 (1962)
2. *Gosa v. State*, 273 Ala. 346, 139 So. 2d 321 (1962)
3. *Johnson v. State*, 272 Ala. 633, 133 So. 2d 53 (1961)
4. *Boggs v. State*, 270 Ala. 209, 116 So. 2d 903 (1959)
5. *Dockery v. State*, 269 Ala. 564, 114 So. 2d 394 (1959)
6. *Martin v. State*, 266 Ala. 290, 96 So. 2d 298 (1957)
7. *Johnson v. State*, 265 Ala. 360, 91 So. 2d 476 (1956)

ARIZONA

8. *State v. McGee*, 91 Ariz. 101, 370 P.2d 261 (1962)
9. *State v. Silvas*, 91 Ariz. 386, 372 P.2d 718 (1962)
10. *State v. Robinson*, 89 Ariz. 224, 360 P.2d 474 (1961)
11. *State v. Fenton*, 86 Ariz. 111, 341 P.2d 237 (1959)
12. *State v. Craft*, 85 Ariz. 143, 333 P.2d 728 (1958)
13. *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446 (1958)
14. *State v. Coey*, 82 Ariz. 133, 309 P.2d 260 (1957)
15. *State v. Thomas*, 73 Ariz. 52, 275 P.2d 408 (1954)
16. *State v. Folk*, 78 Ariz. 205, 277 P.2d 1016 (1954)

ARKANSAS

17. *Moore v. State*, 231 Ark. 672, 331 S.W.2d 841 (1960)
18. *Bracy v. State*, 231 Ark. 647, 331 S.W.2d 870 (1960)
19. *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959)
20. *Young v. State*, 230 Ark. 737, 324 S.W.2d 524 (1959)
21. *Hays v. State*, 230 Ark. 731, 324 S.W.2d 520 (1959)
22. *House v. State*, 230 Ark. 622, 324 S.W.2d 112 (1959)
23. *Walker v. State*, 229 Ark. 685, 317 S.W.2d 823 (1958)
24. *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958)
25. *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
26. *Boyd v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
27. *Boone v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
28. *Byrd v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
29. *Leggett v. State*, 227 Ark. 393, 299 S.W.2d 59 (1957)
30. *Smith v. State*, 227 Ark. 332, 299 S.W.2d 52 (1957)
31. *Jenkins v. State*, 222 Ark. 511, 261 S.W.2d 784 (1953)

CALIFORNIA

32. *People v. Mitchell*, 48 Cal. Rptr. 371 (1966)
33. *People v. Bentley*, 58 Cal. 2d 858 (1962)
34. *People v. Darling*, 58 Cal. 2d 15 (1962)
35. *People v. Ditson*, 57 Cal. 2d 415 (1962)
36. *People v. Busch*, 16 Cal. Rptr. 898 (1961)

37. *People v. Garner*, 57 Cal. 2d 135 (1961)
38. *People v. Hughes*, 57 Cal. 2d 89 (1961)
39. *People v. Lane*, 56 Cal. 2d 868 (1961)
40. *People v. Carter*, 56 Cal. 2d 549 (1961)
41. *People v. Gonzalez*, 56 Cal. 2d 371 (1961)
42. *People v. Lindsey*, 56 Cal. 2d 324 (1961)
43. *People v. Combes*, 56 Cal. 2d 135 (1961)
44. *People v. Kendrick*, 56 Cal. 2d 71 (1961)
45. *People v. Rittger*, 55 Cal. 2d 849 (1961)
46. *People v. Robillard*, 55 Cal. 2d 88 (1960)
47. *People v. Baldonado*, 53 Cal. 2d 824 (1960)
48. *People v. Moya*, 53 Cal. 2d 819 (1960)
49. *People v. Duncan*, 53 Cal. 2d 803 (1960)[1]
50. *People v. Cartier*, 54 Cal. 2d 300 (1960)
51. *People v. Cooper*, 53 Cal. 2d 755 (1960)
52. *People v. Scott*, 53 Cal. 2d 558 (1960)
53. *People v. Wade*, 53 Cal. 2d 322 (1959)
54. *People v. Hooten*, 53 Cal. 2d 85 (1959)
55. *People v. Hamilton*, 52 Cal. 2d 636 (1959)
56. *People v. Jones*, 52 Cal. 2d 636 (1959)
57. *People v. Galtman*, 52 Cal. 2d 283 (1959)
58. *People v. Nash*, 52 Cal. 2d 36 (1959)
59. *People v. Linden*, 52 Cal. 2d 1 (1959)
60. *People v. Duncan*, 51 Cal. 2d 523 (1959)
61. *People v. Feldkamp*, 51 Cal. 2d 237 (1958)
62. *People v. Ward*, 50 Cal. 2d 702 (1958)
63. *People v. Bashor*, 48 Cal. 2d 763 (1957)
64. *People v. Dement*, 48 Cal. 2d 600 (1957)
65. *People v. Tipton*, 48 Cal. 2d 389 (1957)
66. *People v. Hardenbrook*, 48 Cal. 2d 345 (1957)
67. *People v. Cheary*, 48 Cal. 2d 301 (1957)

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[1]Murder for hire.

68. *People v. Johnston*, 48 Cal. 2d 78 (1957)
69. *People v. Riser*, 47 Cal. 2d 566 (1956)
70. *People v. Abbott*, 47 Cal. 2d 363 (1956)
71. *People v. Reese*, 47 Cal. 2d 112 (1956)
72. *People v. Morlock*, 46 Cal. 2d 141 (1956)
73. *People v. Caritativo*, 46 Cal. 2d 68 (1956)
74. *People v. Jordan*, 45 Cal. 2d 697 (1955)
75. *People v. Pierce*, 45 Cal. 2d 697 (1955)
76. *People v. Thomas*, 45 Cal. 2d 433 (1955)
77. *People v. Berry*, 44 Cal. 2d 426 (1955)
78. *People v. Cavanaugh*, 44 Cal. 2d 252 (1955)
79. *People v. Zilbaner*, 44 Cal. 2d 43 (1955)
80. *People v. Burwell*, 44 Cal. 2d 16 (1955)
81. *People v. Caldwell*, 43 Cal. 2d 864 (1955)
82. *People v. Simpson*, 43 Cal. 2d 553 (1954)[2]
83. *People v. Graham*, 43 Cal. 2d 319 (1954)
84. *People v. Santo*, 43 Cal. 2d 319 (1954)
85. *People v. Baldwin*, 42 Cal. 2d 858 (1954)
86. *People v. Byrd*, 42 Cal. 2d 200 (1954)
87. *People v. Rupp*, 41 Cal. 2d 371 (1953)

COLORADO

88. *People v. Monge*, Executed June 7, 1967 (Did not appeal, but is reliably reported to have personally committed the homicide for which he was executed. See Burton, Pileup on Death Row 68-69 (1963)
89. *People v. Bizup*, 150 Colo. 5 (1962)
90. *People v. Hammil*, 145 Colo. 577 (1961)
91. *People v. Wooley*, 145 Colo. 577 (1961)
92. *People v. Early*, 142 Colo. 462 (1960)

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[2]Father had his children murder his wife.

93. *People v. Leick*, 140 Colo. 564 (1959)
94. *People v. Gilbert*, 134 Colo. 290 (1956)
95. *People v. Martinez*, 134 Colo. 82 (1956)

CONNECTICUT

96. *State v. Davies*, 146 Conn. 137 (1959)
97. *State v. Wojculewicz*, 142 Conn. 676 (1955)
98. *State v. Taborsky*, 142 Conn. 619 (1955)
99. *State v. Malm*, 142 Conn. 113 (1955)
100. *State v. Lorain*, 141 Conn. 694 (1954)
101. *State v. Donahue*, 141 Conn. 656 (1954)

DISTRICT OF COLUMBIA

102. *Carter v. United States*, 223 F.2d 332 D.C. Cir. (1955)

FLORIDA

103. *Spinkellink v. State*, 313 So. 2d 666 (Fla. 1975)
104. *Blake v. State*, 156 So. 2d 511 (Fla. 1963)
105. *Lee v. State*, 141 So. 2d 257 (Fla. 1962)
106. *Dawson v. State*, 139 So. 2d 408 (Fla. 1962)
107. *Hill v. State*, 133 So. 2d 68 (Fla. 1961)
108. *Leach v. State*, 132 So. 2d 329 (Fla. 1961)
109. *Smith v. State*, 132 So. 2d 329 (Fla. 1961)
110. *Johnson v. State*, 130 So. 2d 599 (Fla. 1961)
111. *Jefferson v. State*, 128 So. 2d 132 (Fla. 1961)
112. *Brooks v. State*, 117 So. 482 (Fla. 1960)
113. *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959)
114. *Daniels v. State*, 108 So. 3d 755 (Fla. 1959)
115. *Frazier v. State*, 107 So.2d 16 (Fla. 1958)
116. *Withers v. State*, 104 So. 2d 725 (Fla. 1958)
117. *Nelson v. State*, 97 So. 2d 250 (Fla. 1957)
118. *Everett v. State*, 97 So. 2d 241 (Fla. 1957)
119. *Long v. State*, 96 So. 2d 897 (FLa. 1957)

120. *Raulerson v. State*, 93 So. 2d 399 (Fla. 1957)[4]
121. *Rhone v. State*, 93 So. 2d 80 (Fla. 1957)
122. *Ezzell v. State*, 88 So. 2d 280 (Fla. 1956)
123. *LaVoie v. State*, 84 So. 2d 593 (Fla. 1956)[4]
124. *Barwicks v. State*, 82 So. 2d 356 (Fla. 1955)
125. *Ambrister v. State*, 78 So. 2d 876 (FLa. 1955)[4]
126. *Anderson v. State*, 78 So. 2d 876 (Fla. 1955)[4]
127. *Dyer v. State*, 78 So. 2d 402 (Fla. 1955)
128. *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955)[3]
129. *Gillard v. State*, 73 So. 2d 677 (Fla. 1954)[4]

GEORGIA

130. *Jones v. State*, 219 Ga. 245 (1963)[4]
131. *Pugh v. State*, 219 Ga. 166 (1963)
132. *Chandler v. State*, 219 Ga. 105 (1963)
133. *Dye v. State*, 218 Ga. 330 (1962)
134. *Smith v. State*, 218 Ga. 216 (1962)
135. *Wimis v. State*, 216 Ga. 350 (1960)
136. *Mullins v. State*, 216 Ga. 183 (1960)
137. *Davis v. State*, 215 Ga. 788 (1960)
138. *Albert v. State*, 215 Ga. 564 (1959)
139. *Wilson v. State*, 215 Ga. 446 (1959)
140. *Wilson v. State*, 215 G. 282 (1960)
141. *Hill v. State*, 214 Ga. 794 (1959)
142. *Charlton v. State*, 214 Ga. 778 (1959)
143. *Woods v. State*, 214 Ga. 546 (1958)
144. *Murray v. State*, 214 Ga. 350 (1958)
145. *Adams v. State*, 214 Ga. 131 (1958)
146. *Golden v. State*, 213 Ga. 481 (1957)
147. *Dupree v. State*, 213 Ga. 348 (1957)

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[3]Non-triggerman in felony murder.

[4]No facts given in decisions.

148. *Mullins v. State*, 213 Ga. 331 (1957)
149. *Toler v. State*, 213 Ga. 12 (1957)[5]
150. *Elder v. State*, 212 Ga. 705 (1956)
151. *Styles v. State*, 212 Ga. 698 (1956)
152. *Fields v. State*, 212 Ga. 652 (1956)
153. *Cooper v. State*, 212 Ga. 367 (1956)
154. *Cochran v. State*, 212 Ga. 245 (1956)
155. *Turner v. State*, 212 Ga. 199 (1956)
156. *Philpot v. State*, 212 Ga. 79 (1955)
157. *Domingo v. State*, 211 Ga. 691 (1955)
158. *Hill v. State*, 211 Ga. 683 (1955)
159. *Jackson v. State*, 211 Ga. 490 (1955)
160. *Corbin v. State*, 211 Ga. 400 (1955)
161. *Morgan v. State*, 211 Ga. 172 (1954)
162. *Williams v. State*, 210 Ga. 207 (1953)

IDAHO

163. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957)

ILLINOIS

164. *People v. Ciucci*, 21 Ill. 2d 81, 171 N.E.2d 24 (1961)
165. *People v. Dukes*, 19 Ill. 2d 532, 169 N.E.2d 84 (1960)
166. *People v. Carpenter*, 11 Ill. 2d 60, 142 N.E.2d 11 (1957)

INDIANA

167. *Judy v. State*, 416 N.E.2d 95 (Ind. 1981)
168. *Kiefer v. State*, 169 N.E.2d 723 (Ind. 1960)

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[5]No facts given in decision.

IOWA

169. *State v. Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962)
170. *State v. Brown*, 253 Iowa 658, 113 N.W.2d 286 (1962)

KANSAS

171. *State v. Latham*, 190 Kan. 411, 374 P.2d 788 (1962)
172. *State v. York*, 190 Kan. 411, 375 P.2d 788 (1962)
173. *State v. Hickock*, 188 Kan. 473, 363 P.2d 541 (1961)
174. *State v. Smith*, 188 Kan. 473, 363 P.2d 541 (1961)
175. *State v. Andrews*, 187 Kan. 458, 375 P.2d 739 (1960)

KENTUCKY

176. *Moss v. Commonwealth*, 332 S.W.2d 650 (Ky. 1959)
177. *Bowman v. Commonwealth*, 290 S.W.2d 814 (Ky. 1956)
178. *DeBerry v. Commonwealth*, 289 S.W.2d 495 (Ky. 1956)
179. *Nichols v. Commonwealth*, 283 S.W.2d 184 (Ky. 1955)
180. *Milam v. Commonwealth*, 275 S.W.2d 921 (Ky. 1955)
181. *Merrifield v. Commonwealth*, 268 S.W.2d 405 (Ky. 1954)
182. *Tarrence v. Commonwealth*, 265 S.W.2d 52 (Ky. 1953)
183. *Tarrence v. Commonwealth*, 265 S.W.2d 40 (Ky. 1953)

LOUISIANA

184. *State v. Ferguson*, 240 La. 593, 124 So. 2d 558 (1960)
185. *State v. Faciane*, 233 La. 1028, 99 So. 2d 333 (1957)[6]
186. *State v. McMiller*, 233 La. 1028, 99 So. 2d 333 (1957)[6]
187. *State v. Bailey*, 233 La. 40, 96 So. 2d 34 (1957)
188. *State v. Sheffield*, 232 La. 53, 93 So. 2d 691 (1957)
189. *State v. Bush*, 230 La. 181, 88 So. 2d 19 (1956)[7]
190. *State v. Washington*, 230 La. 181, 88 So. 2d 19 (1956)[7]
191. *State v. Chinn*, 229 La. 984, 87 So. 2d 315 (1955)
192. *State v. Brazile*, 226 La. 254, 75 So. 2d 856; 229 La. 600, 86 So. 2d 208 (1956)[7]

MARYLAND

193. *State v. Lipscomb*, 223 Md. 599, 165 A.2d 918 (1960)
194. *State v. Shockley*, 218 Md. 491, 148 A.2d 371 (1959)
195. *State v. Kier*, 216 Md. 513, 140 A.2d 896 (1958)
196. *State v. Daniels*, 213 Md. 90, 131 A.2d 267 (1957)
197. *State v. Thomas*, 206 Md. 575, 112 A.2d 913 (1955)

MISSISSIPPI

198. *Jackson v. State*, 249 Miss. 202, 161 So. 2d 660 (1964)
199. *Anderson v. State*, 246 Miss. 821, 152 So. 2d 702 (1963)
200. *Slyter v. State*, 246 Miss. 402, 149 So. 2d 489 (1963)
201. *Simmons v. State*, 241 Miss. 481, 130 So. 2d 860 (1961)
202. *Stokes v. State*, 240 Miss. 453, 128 So. 2d 341 (1961)

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[6]McMiller was involved along with 2 others and Faclane in a robbery of a store. Faclane shot the storekeeper's son. The opinion does not detail McMiller's degree of participation.

[7]No facts given in decisions.

203. *Goldsby v. State*, 240 Miss. 647, 123 So. 2d 429 (1960)
204. *Dean v. State*, 234 Miss. 376, 106 So. 2d 501 (1958)
205. *Wetzel v. State*, 232 Miss. 366, 98 So. 2d 767 (1957)
206. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227 (1957)
207. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956)
208. *Jones v. State*, 228 Miss. 458, 88 So. 2d 91 (1956)
209. *Townsel v. State*, 228 Miss. 110, 87 So. 2d 481 (1956)
210. *Sorber v. Wiggins*, 226 Miss. 693, 85 So. 2d 479 (1956)
211. *Russell v. State*, 226 Miss. 885, 85 So. 2d 585 (1956)
212. *Keeler v. State*, 226 Miss. 199, 84 So. 2d 153 (1955)
213. *Wiggins v. State*, 224 Miss. 414, 80 So. 2d 17 (1955)
214. *Gilmore v. State*, 225 Miss. 173, 82 So. 2d 838 (1955)
215. *LaFontaine v. State*, 223 Miss 562, 78 So. 2d 600 (1955)
216. *McNair v. State*, 223 Miss. 83, 77 So. 2d 306 (1955)
217. *Gallego v. State*, 222 Miss. 719, 77 So. 2d 321 (1955)
218. *Lewis v. State*, 222 Miss. 140, 75 So. 2d 448 (1954)

MISSOURI

219. *State v. Anderson*, 386 S.W.2d 225 (Mo. 1963)
220. *State v. Tucker*, 362 S.W.2d 509 (Mo. 1962)
221. *State v. Moore*, 303 S.W.2d 60 (Mo. 1957)
222. *State v. Booker*, 276 S.W.2d 104 (Mo. 1955)

NEBRASKA

223. *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958)

NEVADA

224. *Bishop v. State*, 597 P.2d 273 (Nev. 1979)
225. *Archibald v. State*, 362 P.2d 721 (Nev. 1961)
226. *Steward v. State*, 346 P.2d 1083 (Nev. 1959)

NEW JERSEY

227. *State v. Hudson*, 38 N.J. 364, 185 A.2d 1 (1962)
228. *State v. Ernst*, 32 N.J. 567, 161 A.2d 511 (1960)
229. *State v. Sturdivant*, 31 N.J. 165, 155 A.2d 771 (1959)
230. *State v. Stokes*, 19 N.J. 59, 115 A.2d 62 (1955)
231. *State v. A. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
232. *State v. H. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
233. *State v. Cruz*, 17 N.J. 572, 112 A.2d 247 (1955)[8]
234. *State v. Rios*, 17 N.J. 572, 112 A.2d 247 (1955)
235. *State v. Rodriguez*, 17 N.J. 572, 112 A.2d 247 (1955)[8]
236. *State v. Tune*, 17 N.J. 100, 110 A.2d 90 (1954)
237. *State v. Roscus*, 16 N.J. 415, 109 A.2d 1 (1954)
238. *State v. Monohan*, 16 N.J. 83, 106 A.2d 287 (1954)

NEW MEXICO

239. *State v. Nelson*, 65 N.M. 403, 338 P.2d 301 (1959)
240. *State v. Upton*, 60 N.M. 205, 290 P.2d 440 (1955)

NEW YORK

241. *People v. Mays*, 13 N.Y.2d 784, 192 N.E.2d 173 (1963)
242. *People v. Wood*, 12 N.Y.2d 69, 187 N.E.2d 116 (1962)
243. *People v. Miller*, 6 N.Y.2d 154, 175 N.E.2d 547 (1961)
244. *People v. Downs*, 8 N.Y.2d 860, 168 N.E.2d 710 (1960)
245. *People v. Philips*, 8 N.Y.2d 850, 203 N.Y.S.2d 900 (1960)

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[8]Non-triggermen in felony murder.

246. *People v. Chapman*, 8 N.Y.2d 809, 202 N.Y.S.2d 25 (1960)*
247. *People v. Flakes*, 7 N.Y.2d 1038, 200 N.Y.S.2d 422 (1960)*
248. *People v. Green*, 7 N.Y.2d 1038, 200 N.Y.S.2d 422 (1960)*
249. *People v. Vargas*, 7 N.Y.2d 555, 200 N.Y.S.2d 29 (1960)
250. *People v. Mason*, 7 N.Y.2d 891, 197 N.Y.S.2d 200 (1960)
251. *People v. Keith*, 6 N.Y.2d 880, 188 N.Y.S.2d 998 (1959)
252. *People v. Dawkins*, 6 N.Y.2d 814, 188 N.Y.S.2d 201 (1959)*
253. *People v. Richardson*, 5 N.Y.2d 767, 179 N.Y.S.2d 861 (1958)*
254. *People v. Dan*, 4 N.Y.2d 934, 175 N.Y.S.2d 174 (1958)*
255. *People v. LaMarca*, 4 N.Y.2d 923, 175 N.Y.S.2d 167 (1958)
256. *People v. Eckwerth*, 4 N.Y.2d 923, 175 N.Y.S.2d 164 (1958)
257. *People v. Turner*, 4 N.Y.2d 731, 171 N.Y.S.2d 119 (1958)*
258. *People v. Burke*, 3 N.Y.2d 985, 169 N.Y.S.2d 745 (1957)*
259. *People v. Santiago*, 3 N.Y.2d 809, 166 N.Y.S.2d 9 (1957)*
260. *People v. Taylor*, 2 N.Y.2d 1009, 163 N.Y.S.2d 617 (1957)*
261. *People v. Browne*, 2 N.Y.2d 842, 159 N.Y.S.2d 981 (1957)*

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*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

262. *People v. Salemi*, 2 N.Y.2d 159, 159 N.Y.S.2d 972 (1957)
263. *People v. Reade*, 1 N.Y.2d 959, 154 N.Y.S.2d 27 (1956)
264. *People v. Edwards*, 1 N.Y.2d 830, 153 N.Y.S.2d 213 (1956)
265. *People v. Newman*, I N.Y.2d 666, 150 N.Y.S.2d 196 (1956)*
266. *People v. Byers*, 309 N.Y. 908, 131 N.E.2d 580 (1955)*
267. *People v. Roye*, 309 N.Y. 903, 131 N.E.2d 578 (1955)*
268. *People v. Roche*, 309 N.Y. 678, 128 N.E.2d 323 (1955)*
269. *People v. Nichols*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
270. *People v. Reed*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
271. *People v. Rosario*, 308 N.Y. 723, 124 N.E.2d 337 (1954)
272. *People v. Wissner*, 303 N.Y. 856, 104 N.E.2d 917 (1952)*
273. *People v. Cooper*, 303 N.Y. 856, 104 N.E.2d 917 (1952)*
274. *People v. Stein*, 303 N.Y. 856, 104 N.E.2d 917 (1952)[9]

NORTH CAROLINA

275. *State v. Boykin*, 255 N.C. 432 (1961)
276. *State v. Bumon*, 247 N.C. 510 (1958)
277. *State v. Conner*, 244 N.C. 109 (1956)
278. *State v. Scales*, 242 N.C. 400 (1955)

*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

[9]Non-triggermen in felony murder.

OHIO

279. *State v. Griffin,* 180 N.E.2d 924 (Ohio 1962)
280. *State v. Fenton,* 179 N.E.2d 60 (Ohio 1961)
281. *State v. Cosby,* 110 Ohio App. 222, 162 N.E.2d 126 (1959)
282. *State v. Byomin,* 106 Ohio App. 393, 154 N.E.2d 823 (1958)
283. *State v. Tannyhill,* 101 Ohio App. 466, 140 N.E.2d 332 (1956)
284. *State v. Allen,* 133 N.E.2d 167 (1956)

OKLAHOMA

285. *French v. State,* 416 P.2d 171 (1966)
286. *Dare v. State,* 378 P.2d 339 (1963)
287. *Doggett v. State,* 371 P.2d 523 (1962)
288. *Young v. State,* 357 P.2d 562 (1960)
289. *Spence v. State,* 353 P.2d 1114 (1959)
290. *Loel v. State,* 300 P.2d 1013 (1956)
291. *Hendricks v. State,* 296 P.2d 205 (1956)
292. *Fairris v. State,* 287 P.2d 708 (1955)

OREGON

293. *State v. McGahney,* 230 Or. 643, 371 P.2d 669 (1962)

PENNSYLVANIA

294. *Commonwealth v. Smith,* 405 Pa. 456, 176 A.2d 619 (1962)
295. *Commonwealth v. Schuck,* 401 Pa. 222, 164 A.2d 13 (1960)
296. *Commonwealth v. McCoy,* 401 Pa. 100, 162 A.2d 636 (1960)
297. *Commonwealth v. Cater,* Pa., 152 A.2d 259 (1959)
298. *Commonwealth v. Graves,* 394 Pa. 429, 147 A.2d 416 (1959)

299. *Commonwealth v. Thompson*, 389 Pa. 382, 133 A.2d 207 (1957)
300. *Commonwealth v. Cole*, 384 Pa. 40, 119 A.2d 253 (1956)
301. *Commonwealth v. Gossand*, 383 Pa. 239, 117 A.2d 902; 123 A.2d 258 (1956)
302. *Commonwealth v. Wable*, 382 Pa. 80, 114 A.2d 334 (1955)
303. *Commonwealth v. Capps*, 382 Pa. 72, 114 A.2d 338 (1955)
304. *Commonwealth v. Thompson*, 381 Pa. 299, 113 A.2d 274 (1955)
305. *Commonwealth v. Lance*, 381 Pa. 293, 113 A.2d 290 (1955)
306. *Commonwealth v. Edwards*, 380 Pa. 52, 110 A.2d 216 (1954)

SOUTH CAROLINA

307. *State v. Young*, 119 S.E.2d 504 (S.C. 1961)
308. *State v. Britt*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d 669 (S.C. 1959)[10]
309. *State v. Westbury*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d (S.C. 1959)[10]
310. *State v. Bullock*, 111 S.E.2d 657 (S.C. 1959)
311. *State v. Byrd*, 93 S.E.2d 900 (S.C. 1956)
312. *State v. Boone*, 90 S.E.2d 640 (S.C. 1955)
313. *State v. Wright*, 90 S.E.2d 492 (S.C. 1955)
314. *State v. Chasteen*, 88 S.E.2d 880 (S.C. 1955)
315. *State v. Fuller*, 87 S.E.2d 287 (S.C. 1955)

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[10]It is unclear from the reported opinions as to which of these co-defendants shot the victim.

TENNESSEE

316. *Gibbs v. State*, 300 S.W.2d 890 (Tenn. 1957)
317. *Kirkendoll v. State*, 281 S.W.2d 243 (Tenn. 1955)
318. *Sullins v. State*, 281 S.W.2d 243 (Tenn. 1955)[11]
319. *Voss v. State*, 278 S.W.2d 667 (Tenn. 1955)

TEXAS

320. *Johnson v. State*, 378 S.W.2d 76 (Tex. Cr. App. 1964)
321. *Bradford v. State*, 372 S.W2d 336 (Tex. Cr. App. 1963)
322. *Lavan v. State*, 363 S.W.2d 139 (Tex. Cr. App. 1963)
323. *Stein v. State*, 172 Tex. Crim. 248, 355 S.W.2d 723 (1962)
324. *Mosley v. State*, 172 Tex. Crim. 117, 354 S.W.2d 391 (1962)
325. *Wilson v. State*, 171 Tex. Crim. 573, 352 S.W.2d 114 (1961)
326. *Luton v. State*, 171 Tex. Crim. 441, 350 S.W.2d 853 (1961)
327. *Wiley v. State*, 171 Tex. Crim. 366, 350 S.W.2d 22 (1961)[12]
328. *Leath v. State*, 171 Tex. Crim. 209, 346 S.W.2d 346 (1961)
329. *Johnson v. State*, 169 Tex. Crim. 612, 336 S.W.2d 175 (1960)
330. *Stickney v. State*, 169 Tex. Crim. 533, 336 S.W.2d 133 (1960)

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[11]Non-triggerman in felony murder.

[12]While it is unclear from the reported decision whether the victim was killed by Wiley or by co-defendant Mc.Dade or both, Wiley was executed whereas McDade was not.

331. *Williams v. State*, 169 Tex. Crim. 370, 333 S.W.2d 846 (1960)
332. *Philpot v. State*, 169 Tex. Crim. 91, 332 S.W.2d 323 (1960)
333. *Moon v. State*, 169 Tex. Crim. 14, 331 S.W.2d 312 (1959)
334. *Moses v. State*, 168 Tex. Crim. 206, 328 S.W.2d 885 (1959)
335. *Smith v. State*, 168 Tex. Crim. 102, 323 S.W.2d 443 (1959)
336. *Slater v. State*, 166 Tex. Crim. 66, 317 S.W.2d 203 (1958)
337. *White v. State*, 165 Tex. Crim. 339, 306 S.W.2d 903 (1957)[13]
338. *Shaver v. State*, 165 Tex. Crim. 276, 306 S.W.2d 128 (1957)
339. *Lamkin v. State*, 165 Tex. Crim. 11, 301 S.W.2d 922 (1957)
340. *Hall v. State*, 164 Tex. Crim. 573, 301 S.W.2d 161 (1957)
341. *McGowen v. State*, 163 Tex. Crim. 587, 290 S.W.2d 521 (1956)
342. *Webb v. State*, 163 Tex. Crim. 392, 291 S.W.2d 331 (1956)
343. *Bingham v. State*, 163 Tex. Crim. 353, 290 S.W.2d 915 (1956)
344. *Washington v. State*, 162 Tex. Crim. 479, 286 S.W.2d 629 (1956)
345. *Walker v. State*, 162 Tex. Crim. 408, 286 S.W.2d 144 (1956)

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[13]No facts stated as to which of two co-defendants killed the victim.

346. *Farrar v. State,* 162 Tex. Crim. 136, 277 S.W.2d 114 (1955)
347. *Ellisor v. State,* 162 Tex. Crim. 117, 282 S.W.2d 393 (1955)
348. *Meyer v. State,* 160 Tex. Crim. 521, 276 S.W.2d 286 (1954)
349. *Brown v. State,* 160 Tex. Crim. 150, 267 S.W.2d 819 (1954)

UTAH

350. *State v. Gilmore,* (Cr. No. 6405, 4th Jud. Dist., 1976)
351. *State v. Rodgers,* 329 P.2d 1075 (Utah 1958)
352. *State v. Kirkham,* 7 Utah 2d 108, 319 P.2d 859 (1958)
353. *State v. Neal,* 123 Utah 93, 254 P.2d 1053 (1953)
354. *State v. Braasch,* 119 Utah 450, 229 P.2d 289 (1951)
355. *State v. Sullivan,* 119 Utah 450, 229 P.2d 289 (1951)

VIRGINIA

356. *Fuller v. Commonwealth,* 113 S.E.2d 667 (Va. 1960)
357. *Lucas v. Commonwealth,* 112 S.E.2d 915 (Va. 1960)

WASHINGTON

358. *State v. Self,* 59 Wash. 2d 62, 366 P.2d 193 (1961)
359. *State v. Collins,* 50 Wash. 2d 740, 314 P.2d 660 (1957)
360. *State v. Farley,* 48 Wash. 2d 11, 290 P.2d 987 (1955)

WEST VIRGINIA

361. *State v. Bruner,* 143 W. Va. 755, 105 S.E.2d 140 (1958)

WYOMING

362. *Pixley v. State,* 406 P.2d 662 (Wyo. 1965)